No. 508.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

GEORGE W. REED, Administrator with the will annexed of the Estate of Catherine M. Garcelon, deceased, and JAMES P. MERRITT,

Appellants,

vs.

JOHN A. STANLY, Trustee, etc. et al.,

Appellees.

The Appellants' Second Reply Brief

In Reply to the Two Briefs Filed by Appellees Subsequently to the Hearing.

RODGERS, PATERSON & SLACK,

Counsel for Appellants.

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THE APPELLANTS' SECOND REPLY BRIEF

In Reply to the Two Briefs Filed by Appellees Subsequently to the Hearing.

NOTE.—For brevity and clearness of identification, the two briefs to which this is a reply are herein referred to by the names of their respective authors, Mr. Olney and Judge Hayne.

I.

The Additional Briefs.

At the beginning of Mr. Olney's second brief, the statement is made, that "When the oral argument was "concluded in the above case the respective counsel "asked and obtained permission to file supplementary "briefs." The statement is such as to inculcate the impression that *the effect of the oral argument* was to drive the appellants to the necessity of supporting the case with another brief. As such an impression would be the very opposite of the truth, and as it tends to place the appellants in a false and disparaging position, we think it proper to remind the Court of the actual truth concerning the additional briefs.

The appellants' opening brief was prepared in strict conformity with the requirement of the 24th rule of the Court, and, as required by that rule, was served and filed ten days before the argument.

The brief of one set of the appellees (represented by Mr. Olney) was served and filed on the third day before the argument. The brief of the other appellees (for whom Judge Hayne has subsequently appeared as additional counsel) was not served or filed until the next day before the argument.

Though the rule is silent upon the point, it is (as we understand) the settled practice for an appellant to file

a reply brief. Such practice would be, of course, in accord with natural right and with the rule that has been recognized in all debate in every civilized country and from the earliest times. In the case at bar, it was especially proper to file a reply brief, because the briefs filed for the appellees were replete with efforts to sustain the decree appealed from by urging new and novel grounds, and with efforts to shift the defense to grounds different from those taken in the Court below—matters which the appellants could not possibly have foreseen so as to meet them in the opening brief.

The appellants, accordingly, put in a reply brief, and they served and filed their reply brief early on the day of the argument—certainly more than an hour before the argument began.

But when the appellants' counsel, in closing the oral argument, read from the decision of *Shipp* vs. *Williams*, 62 Fed. 4, Judge Hayne (who had come in as an additional counsel for the appellees) made an objection to that authority on the ground that it was not in the appellants' brief. On being answered that it was cited in the reply brief, he made the objection that no leave had been given to file a reply brief. And it was upon finding that objection not sustained that Judge Hayne and Mr. Olney, counsel for appellees, and *they only*, asked leave to file additional briefs The appellants' counsel did not oppose their request, but, upon its being granted by the Court, only claimed and was allowed by the Court the right to reply, *i. e.*, the right

which belongs to every appellant—to every one having the affirmative in argument—to close the argument. Judge Hayne had also, at the beginning of his oral argument, asked the Court to allow him to have it taken down in shorthand while he was speaking, and to file a printed copy of it; and this request had also been granted by the Court.

Such is the truth concerning the briefs. It is the appellees, and they only, that are answerable for the additional briefs.

We must also mention that Judge Hayne's brief, though he asserts it to be a copy of his " oral arguments", which he has " concluded merely to expand ", is actually a new brief which has been, with extreme and unsparing pains and exceedingly great ability and ingenuity, produced subsequently to the oral argument. Though the language is in the form of an oral address to this Court, we do not recognize so much as a sentence of what was actually uttered on the oral argument. As to the matter, much that was in Judge Hayne's oral argument has been omitted, and extensive products of the renewed and unsparing research and ingenuity inserted; and the whole ingeniously interwoven fabric is new. It is not Judge Hayne's oral argument. It is a new production.

Mr. Olney's second brief is also a new brief covering the entire case.

One of the advantages which an appellee's counsel

may obtain by getting leave to print and file his oral argument, and, thereupon pursuing the course above mentioned, is the advantage of having the closing argument. And as if to secure as much as possible of that advantage, Judge Hayne, in a head note to his brief, warns us that we have permission to reply only "to "anything new that might be said".

But Judge Hayne's brief and Mr. Olney's second brief are both replete with proofs that they have been written with a mutual understanding, and that each is the product of a renewed and exceedingly keen, able and thorough search of the entire record and of all the decisions that have been heretofore made relating to the case—a search that has been carried into every nook and corner and has been made throughout as if with microscopes and magnifying glasses—and a most energetic and renewed research throughout the decisions of courts far and wide. In the case of Judge Hayne's brief, in particular, it seems impossible that the researches there indicated and the ingenuity displayed can have been the work of but a single mind, even though laboring unceasingly during the twenty days in which the brief was produced. It would be far more natural for such a brief to be the product of the mutual labors and counsels of a number of minds, all learned and able and all spurred by extreme necessity to do their very utmost.

That such are the efforts that have been put forth, that they have failed utterly, that the appellants' bill

of review passes, with a wide margin, every test produced—all powerfully confirms the conclusion that the decree appealed from should be reversed. We may therefore properly point it out. And, in the course of the review, the true character of the case will, from various points, clearly appear.

II.

The Violation of the Facts.

The appellants' bill of review asks relief on the ground of error in law apparent upon the face of the decree sought to be reviewed, the error being that the subject matter of the suit was not within the jurisdiction of the United States Circuit Court. This particular error is also, in law, fraud; and it has often been, by the Courts, declared to be fraud. (For instance, in *Rich* vs. *Bray*, 37 Fed. 279; and in *Williams* vs. *Nottawa*, 104 U. S. 211.) And in *Ensminger* vs. *Powers*, 108 U. S., the error in law for which the bill of review was sustained was held to be also fraud, the Supreme Court saying (at page 30) that "what was done operated as a legal fraud in respect of "the rights of such party".

Although, in pointing out the error in law apparent upon the face of the decree, we have in the case at bar spoken of it only as error in law, yet that it is in law fraud and actual fraud very rank in degree, is, we

think, manifest. It is, we think, impossible for any unprejudiced mind to look through the record without perceiving it to be such—to use the language of the Court in *Rich* vs. *Bray*, 37 Fed. 279, a subterfuge, a palpable fraud on the jurisdiction—to use the language of the Court in *Williams* vs. *Nottawa*, 104 U. S. 211, a fraud upon the Court, and nothing more. And we think that a careful reading of the decision of *Bowdoin College* vs. *Merritt*, 63 Cal. 213–218, will corroborate such a conclusion.

And if it be borne in mind that the suit of *Bowdoin College* vs. *Merritt* was filed in the United States Circuit Court only fifty-six days after Mrs. Catherine M. Garcelon's death (see Transcript, p. 212 and p. 217), and that, in the face of the solemn guaranty of the Constitution of the United States, that no state shall deny to any person within its jurisdiction the equal protection of the laws, the representatives, heirs and legatees of Mrs. Garcelon have all been—practically ever since her death—barred, by this wrongful use of the processes and powers of the United States Circuit Court, from all inquiry by the Courts of the State of California respecting the validity of the transaction by which so large an amount of property was obtained from her so shortly before her death—and if it be borne in mind that such things as fraud in the acquisition of property from the aged and feeble do actually occur and are cunningly masked, and that the processes and powers of a court of justice may be used as

an instrument in a scheme of fraud—(as the Supreme Court, in *Angle* vs. *Chicago, St. Paul, Etc. Railway*, 151 U. S. 1, found had actually been done in the case there adjudged)—then it should be considered legally possible that by the suit of *Bowdoin College* vs. *Merritt* the United States Circuit Court may have been so cunningly imposed upon as to be used as an instrument in fraudulently acquiring Mrs. Garcelon's property. In *Angle* vs. *Chicago, St. Paul Etc. Railway*, 151 U. S., p. 12, the Court (by Mr. Justice Brewer) said:

> * * * "Such wrongful use of the powers and processes of the Court cannot be recognized as among the legitimate means of contest and competition. It burdens the whole conduct of the Omaha Company with the curse of wrong doing and makes its interference with the Portage Company a wrongful interference."

On pages 4 and 5 of his brief, Judge Hayne—going beyond his oral argument—says that, "After "their aunt's death, they [James P. Merritt and Fred-"erick A. Merritt] filed a contest of her will," etc., "and that "But the nephews did not confine their "attacks to the will. They commenced a suit in the "Superior Court of Alameda County to have the trust "deed declared void," etc. * * *

"*Whereupon*," declares Judge Hayne (pp. 4–5), "cer-"tain of the beneficiaries of the trust, among whom "were the president and trustees of Bowdoin College, "filed an original bill in the Circuit Court of the

" United States setting up substantially the foregoing
" facts [*i. e.*, the litigation instituted by James P. Merritt
" and Frederick A. Merritt against the will and against
" the trust deed] and praying for an injunction against
" *further* litigation by the said two heirs." And on p.
44 he says that the decree sought to be reviewed " sim-
" ply enjoins *further prosecution* of certain unjust
" *attacks upon the trust*."

These statements of Judge Hayne mistake the case. Moreover, Judge Hayne was, as he himself declares (p. 16), one of the counsel who conducted the original suit in the Circuit Court, and ought to be thoroughly and especially conversant with the facts.

Frederick A. Merritt never contested or took any part in contesting the will. This is expressly stated, over Judge Hayne's signature, in the "Third Supplemental Bill." (See Transcript, pp. 213, 214, 215).

Frederick A. Merritt never commenced or took any part in commencing a suit against the trust deed. The facts are stated in the original bill (Tr., pp. 18–42), and all the suits are recounted, over Judge Hayne's signature, in the "Second Supplemental Bill" (Tr. pp. 120–179), and no suit by Frederick A. Merritt is anywhere mentioned. And no such suit ever existed.

When the suit of *Bowdoin College* vs. *Merritt* was commenced in the United States Circuit Court, no suit or proceeding had been commenced by James P. Merritt, or by any person, either against the will or against

the trust deed. James P. Merritt's attempt to contest the will was not commenced until September, 1892, about seven months after the suit in the United States Circuit Court was commenced. This attempt to contest the will is not mentioned in the record of the suit of *Bowdoin College* vs. *Merritt* until the "Third Supplemental Bill," filed May 16, 1895. (Tr. pp. 213, 215). True, the record does not state *at what particular time* this proceeding of James P. Merritt to contest the will was commenced, but it does state that it was not until after the will was admitted to probate, *i. e.*, after Feb. 1, 1892, and the omission to mention it in the original bill in *Bowdoin College* vs. *Merritt* is evidence that it had not been commenced when that bill was filed. As we have already stated, it was, in fact, not commenced until September, 1892, nearly seven months after the suit in the United States Circuit Court was commenced.

As to any suit by James P. Merritt "to have the trust deed declared void" (Judge Hayne's brief p. 4), no such fact is alleged or even mentioned anywhere in the record sought to be reviewed. The only mention of such a suit is in the *bill of review*. (See Tr. pp. 274–276), and even there it is alleged to have been commenced only (p. 274) "prior to the making of said decree." It is not stated to have been commenced, and in truth, it was not commenced, until long after the suit of *Bowdoin College* vs. *Merritt* was commenced in the Circuit Court.

It is upon the basis of such errors as to the facts that Judge Hayne attempts to show that the controversy which is the subject matter of the suit of *Bowdoin College* vs. *Merritt* was a controversy between the beneficiaries named as complainants and the trustees Stanly and Purington. He declares (p. 38):

> * * "Upon the face of the bill there was clearly a breach of trust on the part of the trustees. The bill charges that by the acts and machinations of the Merritts and their confederates the purpose of the trust was being frustrated and destroyed and its property endangered. In this condition of affairs it was clearly the duty of the trustees to protect their trust. Their failure to do so was a breach of trust which placed them in distinct antagonism to the beneficiaries."

But, unfortunately for such argument, the decree shows on its face that the suit was commenced within only 56 days of the death of Mrs. Garcelon, and before any suit or proceeding whatever had been commenced against the trust, and also that by the terms of the declaration of trust the trustees Stanly and Purington were expressly given, for five years after her death, an "uncontrolled discretion" as to the time when they should convert the property into money and pay it over to the beneficiaries. (See the exhibits, part of the original bill, p. 53.)

Besides, though the original bill avers a refusal of the trustees to bring, within 56 days after Mrs. Garcelon's death, a suit to quiet their title, it shows no request to the trustees to join as co-complainants with

the beneficiaries in such a suit and no refusal of the trustees to join as co-complainants in such a suit. (Tr. p. 37.)

And, still further, upon the bill being filed, the trustees Stanly and Purington, though not summoned, voluntarily appeared as parties to the suit, and, as such, expressly declared all the allegations of the bill to be true, offering only a correction showing that two pieces of the real estate had been, pursuant to the express terms of the deed of trust, converted into money before Mrs. Garcelon's death—a correction which was forthwith accepted by the nominal complainants; and in this position the trustees Stanly and Purington (until the death of Purington, and afterward the trustee Stanly) ever after remained in the suit, as parties to it, the surviving trustee Stanly accepting and ever since doing all in his power to defend the final decree made in the suit in his favor.

How untrue, then, is the argument that there was in the suit any charge that the trustees were guilty of breach of trust, that the suit was a prosecution of the trustees for breach of trust, that there was in the suit any controversy whatever between the beneficiaries, or any beneficiary, and the trustees!

Let us, in this particular, compare the case with

Shipp vs. *Williams*, 62 Fed. 4;

Hutton vs. *Joseph Bancroft & Sons Co.*, 77 Fed. 481, and

First Nat. Bk. vs. *Radford Trust Co.*, 80 Fed. 569.

Shipp vs. *Williams*, 62 Fed. 4, was a suit by beneficiaries in certain trust deeds made to secure creditors, to obtain a foreclosure of the trust deeds and a sale of the property and distribution of the proceeds. The trustees were made parties and named as defendants, and the averment of the bill concerning their refusal to act was as follows (p. 5):

> "The bill then alleges that the said defendants Woodworth and Wheeler [the trustees], discouraged by the obstacles thrown in their way for purposes of delay, have 'refused and declined to further exercise their duties as trustees under said deeds of trust, and announce their determination to decline the use of their names and services in the matter of foreclosing said deeds of trust.'"

It was upon that averment that the Circuit Court of Appeals for the Sixth Circuit held that the controversy which was the subject matter of the suit was between the trustees, on the one side, and the mortgagor defendant on the other; that the demurrer to the bill was well taken and that the case was not within the jurisdiction of the Circuit Court. The case is also reported in 22 U. S. Appeals, p. 380, and 10 C. C. A. p. 247.

Hutton v. Joseph Bancroft & Sons Co., 77 Fed. 481, was a suit by a stockholder of the Joseph Bancroft Sons Co. against one Bloede to obtain the cancellation of a contract between the Joseph Bancroft & Sons Co. and Bloede and the surrender by Bloede of stock of the

company, and the repayment by him of the dividends thereon, he having received such stock and dividends by means of the contract sought to be cancelled. The Joseph Bancroft Sons Co. was made a party and named as a defendant.

Some of the allegations of the bill were (p. 483):

> "that the purchase [from Bloede] of the stock of the Bloede Company was not necessary for the business of the Bancroft & Sons Company, was made without lawful authority, and in violation of complainant's rights; that Bloede has received large sums of money in dividends on the stock sold to him; that other dividends have been declared on said stock, which remain unpaid, and still further dividends will be declared, which, together with the unpaid dividends, will be paid to Bloede by the Bancroft & Sons Co., unless it is restrained by injunction."

Part of the relief asked was (p. 483) "that the Bancroft & Sons Company may be restrained by injunction from paying over to Bloede any unpaid dividends, "etc." The Circuit Court held that the Joseph Bancroft & Sons Co. was a party on the opposite side of the controversy from Bloede, saying:

At p. 482:

> "Such being the settled law, the next inquiry is to ascertain the nature of the controversy between the parties to the present suit, and in what position they jointly or severally stand in relation thereto." * * *

The Court then states the facts and continues (p. 484):

"In the facts as they are stated in the record,

there appears to be no matter of dispute, or any controversy whatever, between the complainant and the defendant, the Joseph Bancroft & Sons Company. On the contrary, it is apparent that their interests in the outcome of the present suit are really the same, and that they are both seeking the same objects, to wit, the return and cancellation of the stock of the Bancroft Sons Company which has been issued to Bloede, the repayment of the money paid to him for dividends thereon, and an injunction to prevent the payment of any further dividends on that stock. So complete is the identity of interest between the complainant and the Bancroft & Sons Company, there cannot be the slightest doubt that a decree sustaining the bill in every particular would be equally satisfactory to both. In fact, they are, for the purposes of the present suit, joint complainants."

First Nat. Bank vs. *Radford Trust Co.*, 80 Fed. 569, was a suit by beneficiaries in a trust mortgage, to foreclose the mortgage. The trustee was made a party to the suit and named as a defendant. The averment of the bill concerning the trustee was as follows (pp. 573–4):

"R. M. Barton, Jr., the trustee, not only declined and neglected to advertise and sell the property covered by said trust deed, but complainant avers that he had definitely and positively determined and declined to join as a party bringing said suit; that he had, in fact, for reasons personal to himself, and having no reference to this cause, or to giving this Court jurisdiction thereof, positively and definitely determined not to execute the trust, and to have nothing to do as trustee with the matters and trusts created by said deed; that he had reached this determination before he was

aware that this suit would be brought, and before his connection therewith; that he did this, not for the purpose of giving this Court jurisdiction, but that his conduct would have been the same under any and all circumstances, and, as before stated, for reasons personal to said trustee, and which were in his judgment imperative and conclusive on him."

Upon that state of facts the Circuit Court of Appeals, stating what, of course, is manifestly true, said, at p. 575:

"If the only object of complainant's bill had been to foreclose the Barton mortgage, such an averment as to the reasons moving Barton in his refusal to instigate such a proceeding would be insufficient to show any real antagonism between the complainant and himself as trustee, and would bring the case within the facts of *Railroad* vs. *Ketchum*, [101 U. S. 289-298] and *Shipp* vs. *Williams*, [62 Fed. 4], elsewhere cited, and require that the complainant and Barton should be treated as on the same side of the real controversy, which, in the case supposed, would have been the mere question of the foreclosure of the mortgage,—a controversy wholly with the mortgagor."

This case is also reported in 47 U. S. App., at p. 692, and in 26 C. C. A. at p. 1.

On p. 8 of his brief, Judge Hayne declares—speaking beyond what he said in his oral argument—that between the time when the second appeal to the Supreme Court was dismissed and the bill of review was filed, "Judge "Stanley * * had, in the meantime, paid many

" legacies." He also states (p. 41) that he has in mind that he is " not at liberty to go outside the record."

The assertion that between the dismissal of the second appeal and the filing of the bill of review "Judge Stanly * * paid many legacies " is, apparently, made for the purpose of enlisting sympathy for him as an influence hostile to the appellants. Of course, if such a fact could be interposed as a defense, it could be urged only on behalf of the trustee Stanly, and not on behalf of any person for whom Judge Hayne ostensibly appears, for no one but the defendant Stanly could possibly be endangered by such payments. The assertion was previously made in Mr. Olney's first brief (p. 14), a brief put in for the trustee Stanly, and was again urged by Mr. Olney in his oral argument. Mr. Olney's assertion is that the trustee Stanly has thus paid " more than $200,000 to the beneficiaries " named in the deed of trust ". *But, the simple truth is, that no such fact appears anywhere in the record. It nowhere appears in the record that so much as even a cent of any such payment has been made.* And that no such fact appears in the record was expressly stated by us at the oral argument.

It may be added, that if the trustee Stanly has in fact made such payments, he has done so with his eyes open, and in defiance of the appellants, and with the law before his eyes giving the appellants the right to a bill of review, and without any act or omission of the appellants or either of them justifying even so much

as the slightest suspicion that they would no further seek relief against the decree now sought to be reviewed, or acquiesce in any such payment. Such payments, even if made, can, therefore, have not even the shadow of effect as an estoppel.

On p. 7 of his brief Judge Hayne delares that "the "bill 2 [the bill of review] makes vague allegations of "fraud (which were subsequently abandoned)", etc. The natural tendency of the statement is to convey the impression that the appellants now concede that no such fraud or collusion existed. And this he follows up on pages 29–31 with a long line of assertions that it is fully established that there was not so much as a shadow of collusion between the nominal complainants and the trustees Stanly and Purington.

The fraud alleged in the bill of review is stated on pages 271–274 of the transcript. Instead of being "vague", those allegations are exceedingly definite, precise, extensive and full. They are stated in the bill as matter naturally and properly to be considered (as was held by the Court in *Cilley* vs. *Patten*, 62 Fed. 499) in connection with the error in law apparent on the face of the decree. Those allegations were not "subsequently abandoned". They were demurred to by the appellees on the ground that the law does not permit them to be established as a ground

for relief (see the transcript, pp. 289, 294, 299). In his opinion Judge Hawley declares that demurrer to those allegations to be well taken (Tr. pp. 311–12). It does not follow that those allegations have been abandoned because not urged here. They are unnecessary allegations. They add nothing to the legal effect of the case. Such is the ruling of the Circuit Court of Appeals in *First Nat. Bk.* vs. *Radford Trust Co.*, 80 Fed. 569, 573–4, cited and quoted above, and is manifestly true. Over and above those allegations, and independently of them, the right to the relief prayed for appears fully as error of law apparent on the face of the pleadings and decree; and it is to that ground that we have therefore confined the argument here. As said by the Supreme Court in *Gunton* vs. *Carroll*, 101 U. S. 428:

> "The demurrer must be overruled, if there be any part of the bill which entitles the complainants to relief."

So far is the ground of actual fraud from being "abandoned," that, upon the bill of review being upheld on the ground of the error of law apparent on the face of the decree, and upon the enrollment being thereupon opened, the Court will be at liberty to do (as was done by the Court in *Cilley* vs. *Patten*, 62 Fed. 499)—consider all the evidence of the fraud taken in the original case, which, as the bill of review alleges and the demurrer admits (Tr. pp. 273–4), fully proves all

the fraud alleged. That such is the settled practice, see

Catterall vs. *Purchase*, 1 Atk. 290. (by Lord Hardwicke).
Carey vs. *Giles*, 10 Ga. 9, 22;
Enochs vs. *Harrelson*, 57 Miss. 465, 468–9;
Payne vs. *Beech*, 2 Tenn. Ch. 709.

The only exception to the course here stated is where such evidence would be superfluous, *i. e.*, where the error of law apparent on the face of the decree is itself vital to the case, as where (as in the case at bar) it is apparent upon the face of the pleadings and decree that the Court was without jurisdiction of the original suit.

Carey vs. *Giles*, 10 Ga. 9, 22, 23;
Cook vs. *Bamfield*, 2 Ves. Sen. 607.

As to the series of assertions on pages 29–31 of Judge Hayne's brief, that it is fully established that there was no fraud or collusion in instituting and maintaining the suit, another and conclusive answer is that, inasmuch as it is apparent upon the face of the decree, as a matter of law, that the Court was without jurisdiction of the suit, no matter of fact whatever is established by the decree. As said by the Supreme Court (by Mr. Justice Swayne) in *The Mayor* vs. *Cooper*, 6 Wall. at p. 250:

> * * "If there was no jurisdiction, there was no power to do anything but to strike the case from the docket." * *

In *Bland* vs. *Fleeman*, 29 Fed. 672, the Court said:

"To give jurisdiction there must be subject-

> matter upon which the Court has a right to pass. * * * Proper and necessary parties are as much an element of jurisdiction as any of the other elements of it. If either one of these elements which go to make it up fail, there is a failure of jurisdiction, and the suit is not properly before the Court."

And in *Williams* vs. *Nottawa*, 104 U. S., the Supreme Court (by Chief Justice Waite) expressed the same idea, saying (at p. 213):

> * * " In such a case we deem it our duty to stop the suit just where it should have been stopped in the Court below, and remit the parties to their original rights."

On pages 9–10 of his brief, Judge Hayne says that the validity of the contracts alleged in the original bill and attached to it as exhibits and thus made a part of the original bill " has never been in any way contested, " but on the contrary has always been admitted in the " Circuit Court, and is established by the final decree. (Tr. pp. 224–27.)"

The answer to this is, first, that it is not true that the validity of those contracts was admitted by James P. Merritt by his answer in the suit, and no such admission appears in the transcript; and, secondly, inasmuch as it is apparent on the face of the decree, as matter of law, that the Court was without jurisdiction of the suit, the final decree establishes nothing whatever except that fatal absence of jurisdiction, and hence

it is immaterial whether the validity of those alleged contracts was or was not contested. The Court was without power to consider or receive any such contest.

III.

The Violent Treatment of the Statute, the Authorities and the Points.

(a) Relating to the Error at Law apparent on the Face of the Decree.

1. In Judge Hayne's brief it is laboriously urged (pp. 19–23) that the provision of section 5 of the Act of 1875 (quoted on p. 56 of the appellants' opening brief) directing the dismissal of the suit whenever it appears "that such suit does not really and substan-"tially involve a dispute or controversy properly "within the jurisdiction of said Circuit Court"—that this provision does not authorize the dismissal of a suit where the jurisdiction depends on the diverse citizenship of the parties to the controversy and where the pleadings show that the suit is not a controversy between citizens of different states.

To refute such a contention it is, of course, enough merely to mention it. The language of the statute is

too plain and it has been too often applied to justify comment. See, for instance :

Coal Company vs. *Blatchford*, 11 Wall. 172 ;
Pittsburg, etc. Ry. Co. vs. *Baltimore, etc. R.R. Co.*, 22 U. S. App. 365–6;
Board of Trustees vs. *Blair*, 70 Fed. 416 ;
Bland vs. *Fleeman*, 29 Fed. 671 ;
Ayres vs. *Wiswall*, 112 U. S. 191 ;
Thayer vs. *Life Association*, 112 U. S. 719.
Railroad Company vs. *Swan*, 111 U. S. 382.

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2. In Mr. Olney's second brief (pp. 2–3) it is urged that the want of jurisdiction of the suit was matter to be raised "by plea in abatement," and therefore it "cannot be reached by a bill of review."

But, unfortunately for such contention, it is thoroughly settled that the objection of want of jurisdiction need never be made by plea in abatement. The objection is equally fatal even though it may not be even so much as suggested in any form by a party. And, even though it may appear for the first time in the appellate Court, and even there without being so much as suggested by any party, it is equally fatal.

Railroad Company vs. *Swan*, 111 U. S. 382–4.
Coal Co. vs. *Blatchford*, 11 Wall. 192 ;
Williams vs. *Nottawa*, 104 U. S. 211 ;
Graves vs. *Corbin*, 132 U. S. 590 ;
Norris vs. *Gilmer*, 129 U. S. 325–6 ;
Board of Trustees vs. *Blair*, 70 Fed. 416.

Of course, where (as in the original suit under review in the case at bar) the want of jurisdiction appears on the face of the bill, the objection was properly raised by demurrer, and with equal propriety by the motion to dismiss the suit.

Coal Co. vs. *Blatchford*, 11 Wall. 172;
Rust vs. *Brittle Silver Co.*, 58 Fed. 611 (Circuit Court of Appeals);
Morris vs. *Gilmer*, 129 U. S. 326;
Pittsburg Etc. Ry. Co. vs. *Baltimore Etc. R. R. Co.*, 22 U. S. App. 365–6;
Bland vs. *Fleeman*, 29 Fed. 671;
Ayres vs. *Wiswall*, 112 U. S. 191;
Thayer vs. *Life Ass'n*, 112 U. S. 719.

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3. In Mr. Olney's second brief (pp. 2–7) it is also urged that " where a matter is contested on the trial of " the original action, and error complained of could be " corrected by appeal, a bill of review will not lie." In support of such contention he cites *Hoffman* vs. *Knox*, 58 Fed. 484, and quotes extensively from that decision.

But no such ruling was made in *Hoffman* vs. *Knox*, 50 Fed. 484. On the contrary, that decision proceeded solely on the ground that though the decree there sought to be reviewed might have been *erroneous*, the error was not *apparent* on the face of the decree (See 50 Fed. 490–491). This distinction is admirably stated in *McCall* vs. *McGurdy*, 69 Ala. 71, and is pointed out below.

We think it impossible to find anywhere a decision that "where a matter is contested on the trial of " the original action, and error complained of could be "corrected by appeal, a bill of review will not lie." On the contrary, nothing is more thoroughly settled than that where the error in law is *apparent* on the face of the decree, the writ of error is the full equivalent of a writ of error or an appeal.

Smith vs. *Clay*, Amb. 647 ;
Brewer vs. *Bowman*, 3 J. J. Marsh (Ky.) 493;
Payne vs. *Beech*, 2 Tenn. Ch. 709;
McCall vs. *McGurdy*, 69 Ala. 71.

And, upon a writ of error or an appeal, the general rule is that no error will be considered unless it *was contested* in the Court below.

Klein vs. *Russell*, 19 Wall. 463;
Elevated R. R. vs. *Fifth Nat. Bank*, 135 U. S. 441.

But where the error is the want of jurisdiction of the Court, it is immaterial whether it was or was not contested in the Circuit Court or, what is the same thing, in the original suit.

Graves vs. *Corbin*, 132 U. S. 590.

And if it were, as Mr. Olney urges, the especial function of a bill of review to correct an error in law apparent upon the face of the decree, *where such error was not actually considered by the Court in the original suit*, it should not be overlooked that the bill of review in the case at bar seeks that identical remedy. As pointed out in the appellants' opening brief (pp. 42–45), in the

original suit, the Circuit Court did not actually consider the point that the controversy stated in the pleadings was there affirmatively shown to be a controversy between citizens of the State of California, and never even mentioned the point except to declare (erroneously) that any consideration of it was precluded by "the law of the case."

See *Bowdoin College* vs. *Merritt*, 63 Fed. 214–215.

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4. It is to support the argument last mentioned that Mr. Olney declares (p. 23) that "the Court will " not look into the merits of the judgment of the Court " below, a judgment reached after much discussion and " careful consideration", and (p. 7) that "it was a " question hotly contested before the Court and decided " upon grave deliberation."

In this Judge Hayne supports Mr. Olney, asserting (pp. 15–17) that the question whether the controversy exhibited in the pleadings was a controversy between citizens of different States was carefully considered and passed upon in the Court below.

In the appellants' opening brief, we have pointed out and given the proof that though the appellants respectively made every effort to obtain a consideration of the question in the original suit, they utterly failed in their efforts. (Appellants' Brief, pp. 42–45)

On p. 16 of his brief, Judge Hayne seeks to convey

the impression that the Circuit Court not only actually passed upon the question, but, still further, was the moving spirit in raising it and having it investigated. He says (p. 16): "While we were arguing the "questions arising upon the evidence taken upon the "pleas, Judge McKenna called our attention to the "decisions as to the alignment or arrangement of parties "to the record, which is the very proposition which "forms the basis of the bill of review. Not being then "familiar with the decisions, I got time to put in a brief," etc., and he reminds the Court that the appellants' counsel here was not then present and therefore is not in a position to contradict.

But such representation is answered by the record itself. As pointed out in the opening brief, it was these appellants who raised the question and argued the objection, and the truth of this is ~~approved~~ affirmed by Judge McKenna in his opinion, where it is expressly stated.

See *Bowdoin College* vs. *Merritt*, 63 Fed. 214.

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5. On page 26 of his brief, Judge Hayne quotes section 407 of *Story's Eq. Pleading*, as limiting the scope of a bill of review to the face of the decree itself, *excluding the pleadings*, and as declaring that to go beyond the bare face of the decree is to go into *the*

evidence. To make this out he quotes the following language, putting it in italics:

" *If, therefore, the decree do not contain a statement of* " *the material facts on which the decree proceeds, it is* " *plain that there can be no relief on a bill of review, but* " *only by an appeal to some superior tribunal.*"

Having quoted thus far, Judge Hayne carefully stops. On pages 27–28 he reiterates that as the rule. On page 28 he declares: " Under this rule, the silence of the decree is the precise equivalent of an express adjudication upon all the issues raised—or at least upon all which support the decree." He then quotes again the same language, again carefully cutting off the quotation at the same point. And he then calls it " this principle " and " Let us now apply this principle ", etc.

It is upon the basis of " this principle ", that Judge Hayne rears his contention that (p. 24): " The position " taken in the bill of review and argued by counsel for " the appellants *is not a question of law, but a question* " *of fact* "—a contention he laboriously urges through pages 24–36, and which he asserts, on pages 54 and 56, as fully established.

The entire fabric of this contention rests upon a partial and incorrect quotation of Section 407 of *Story's Equity Pleading*.

Section 407 of *Story's Equity Pleading* is taken verbatim from *Dexter* vs. *Arnold*, 5 Mason, 311–312. In

the passage of which Judge Hayne quotes a part, the words which he has selected are a statement of the rule *in England*, and only a few words beyond the point where he stops, the language (all taken from *Dexter* vs. *Arnold*, 5 Mason, 311) is as follows:

> "In *England* the decree embodies the substance of the bill, pleadings and answers; in the courts of the *United States* the decree usually contains a mere reference to the antecedent proceedings without embodying them. But for the purpose of examining all errors of law, the bills, answers and other proceedings are, in our practice, as much a part of the record before the Court as the decree itself; for it is only by a comparison with the former that the correctness of the latter can be ascertained."

All this was stated by the Supreme Court with still greater fullness and precision in *Whiting* vs. *U. S. Bank*, 13 Pet. 14. The language is quoted on p38-9 of this brief.

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6. As just mentioned, it is upon the basis of this quotation of Story that it is laboriously urged in Judge Hayne's brief (p. 32) that the question as to what was the controversy which constituted the subject matter of the suit, and who were the parties to such controversy "is not a matter of law, but a matter "of fact", and therefore not to be considered on a bill of review. The contention is that, in order to deter-

mine whether there is error of law apparent, we must consider by itself, separately from the facts, the rule of law which, if properly applied, would support the decree, and that, regardless of what appears on the face of the decree and pleadings, the facts must be conclusively assumed to be such as to make that rule of law properly applicable.

It is to lead up to such contention that Judge Hayne declares on p. 31 and again on p. 36 that it must be conclusively assumed that:

" It is not true that *the controversy was between* " *Stanly and Purington*, *on one side*, *and James P. and* " *Frederick A. Merritt on the other*."

And on pages 29–31, and again on page 35, other like statements are set out, apparently to lay the foundation for the same contention.

The contention is so erroneous and so laboriously urged, that it is in substance and truth a confession that the decree to be reviewed can not be defended. Clearly stated, the contention is that, regardless of what appears on the face of the decree and pleadings, everything needful to make the decree correct and valid must be conclusively presumed to exist —that in the case at bar, we must take it for granted that the respective interests of the parties were such as to make the controversy one between citizens of different States, and, taking all this

for granted, to consider only "the ultimate point to be "determined", that "ultimate point" being whether a controversy between citizens of different States is a controversy between citizens of different States. On p. 23 Judge Hayne gravely says that "the failure to observe "the distinction * * * sometimes leads to con- "fusion of thought". The contention is that in the case at bar, we must consider only the question whether the rule of law that the United States Circuit Courts have jurisdiction of controversies between citizens of different States is or is not erroneous.

If the contention were sound, a bill of review for error in law apparent upon the face of a decree could never be upheld. To illustrate this we may cite a few instances.

In *Ensminger* vs. *Powers*, 108 U. S. 292, the bill of review was upheld, because it was apparent on the face of the decree that it had been made without a hearing. And the Court declared (p. 301) that

> "Words need not be multiplied to argue that a decree rendered under such circumstances must, on a bill of review, be held for naught and as if it did not exist."

In *Mickle* vs. *Maxwell*, 42 Mich. 304, the bill of review was sustained because the decree was contrary to the terms of a mortgage set forth and referred to in the pleadings.

In *Enochs* vs. *Harrelson*, 57 Miss. 465, the bill of review was upheld because the decree subjected land to a vendor's lien which the original bill showed did not exist thereon.

In *Thompson* vs. *Maxwell*, 16 Fla. 773, the bill of review was upheld, because the decree (a decree of foreclosure and sale) included land not described in the mortgage, a copy of which was annexed to the original bill.

In *Pract* vs. *Lange*, 81 Va. 711, the bill of review was upheld because the decree was based upon the erroneous conclusion that a trustee had power to contract debts binding upon the trust real estate, the deed of trust being annexed to the original bill.

These instances might be extended indefinitely. In none of them would it have been any more palpably fallacious than in the case here to contend that the ground of the bill of review was " not a matter of law, " but a matter of fact ".

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7. It is in connection with the three contentions last mentioned that Judge Hayne on pp. 26–27 of his brief—going beyond his oral argument—cites *Evers* vs. *Watson*, 156 U. S. 527, and endeavors to make it a conclusive authority against the case here. He does not say directly that it was a bill of review, but it is

substantially presented as such and as having been brought on the same grounds as the case here and, indeed, to have been precisely parallel with the case here. To make it so appear, he misstates the case, saying (p. 27) that: " The ground of " the bill was that the record showed upon its face that " the Circuit Court had no jurisdiction " and that " there " was no doubt about the fact that the record showed " that citizens of the same State were on both sides of " the cause ", etc., and that " the Supreme Court *held* " that upon such a bill this circumstance was not con- " clusive, because it was possible that the evidence " showed good reasons for arranging the parties so as " to obviate the objection, and that it must be pre- " sumed that the Court had acted in pursuance of such " an arrangement ". He also declared (p. 26) that the Court held that " so far as the facts are concerned the " attack is essentially a collateral one and that *all the* " *presumptions in which a Court will indulge in support* " *of a decree upon a collateral attack are to be indulged* " *in upon a bill of review* ".

It is to be observed that Judge Hayne approaches the point warily, first calling a bill of review a collateral attack " so far as the facts are concerned ", and then at a leap making it a collateral attack out and out.

Whenever a Court is asked to set aside a judgment or decree, the attack upon the judgment or decree is, of course, either direct or collateral. There is, of course,

no such thing as an attack which is collateral only "so far as the facts are concerned". The attack is either wholly collateral or wholly direct.

Evers vs. *Watson*, 156 U. S. 527, was not a bill of review and did not exhibit the record of the decree sought to be attacked. The suit was not brought as a bill of review, nor mentioned nor sought to be sustained as such. It was a "bill in equity" (p. 527) to set aside, upon the ground of fraud, a judicial sale of lands made under a decree and also the decree itself. It was not brought until five years after the decree attacked (pp. 527, 535), a lapse of time which would of itself have precluded a bill of review. It was a collateral attack upon the decree, and was expressly decided on that ground. That it was a collateral attack on the decree, and not a bill of review, see also

Van Fleet on Collateral Attack, §§ 2, 3.

In *Evers* vs. *Watson*, 156 U. S. 527, the decree attacked had been made by the Circuit Court of the United States in a suit which had been removed to it from a State Court. In such a case the only part of the record in which the citizenship of the respective parties to the controversy appears is in the petition for removal. The remainder of the record is the record of the case as it was made up in the State Court, and as the citizenship of the parties is immaterial in the State Court, it is never stated in the record there. Hence the jurisdictional part of the record of such a suit in

the United States Circuit Court is the petition for removal.

Armory vs. *Armory*, 95 U. S. 187;

Insurance Co. vs. *Pechner*, Id. 185.

In *Evers* vs. *Watson*, 156 U. S., the Court said (at 531):

> * * * " Nor is there a copy of the petition [*i. e.* the petition for removal] or the substance of it, either incorporated in the bill or annexed thereto as an exhibit."

A bill of review for error apparent must set out in full the pleadings, proceedings and decree, the entry record of the suit in which the decree to be reviewed was made.

Story Eq. Pl., §§ 420, 428 ;

Mitford Eq. Pl., Ch. 1, § 3, Pt. 2.

In *Evers* vs *Watson*, 156 U. S. 527, the Court neither held nor said that " it was possible that the *evidence* " showed good reason for arranging the parties so as to " obviate the objection ". It only held (p. 532) after declaring (p. 531) the allegations of want of jurisdiction to be " very meager ", that "*for aught that appears* ", the interests of the parties might have been such as to give jurisdiction of the suit to the Federal Court. Nothing whatever was said or intimated as to its appearing in the *evidence*.

It is not true that in *Evers* vs. *Watson*, 156 U. S., " There was no doubt about the fact that the record " showed that citizens of the same State were on both " sides of the cause ", or that the Court so held. On

the contrary, the Court expressly declared (p. 532) that nothing of the kind appeared.

In *Evers* vs. *Watson*, 156 U. S., the Court expressly said of the United States Circuit Courts, that (p. 533) "if jurisdiction were not alleged in the "pleadings, their judgments and decrees were erron-"eous and *might be reversed for that cause*, but that "they were not absolute nullities" and therefore not open to collateral attack.

It is for the very reason that such a decree is not void, not an absolute nullity, that relief may be had by a bill of review. If the decree were merely erroneous, but not absolutely void, no one would be aggrieved by it.

That a judgment or decree is erroneous can never be predicated when it is in question collaterally. In the case of judgments or decrees of the United States Circuit Courts this rule applies to erroneous assumption of jurisdiction as well as to errors concerning the merits, the reason being that those Courts "though of "limited are not of inferior jurisdiction" (*Evers* vs. *Watson*, 156 U. S. 533). The rule neccessarily applies to decrees where the error is apparent on the face of the decree as well as to those merely erroneous, because the reason for the bill of review is that such decrees are valid collaterally; for if they were not valid collaterally no one would be aggrieved by them.

In *Ogilvie* vs. *Hearne*, 13 Ves. 564, the Court said: * * "The consequence is that it cannot be

impeached collaterally, but must, like every other decree, be impeached directly, upon a bill of review or a bill to set it aside for fraud."

This is quoted with approval by the Supreme Court in

Thompson vs. *Wooster*, 114 U. S. 111.

It is thoroughly settled that a bill of review is a direct and not a collateral attack, and that it is in the nature of a writ of error.

Van Fleet, *Collateral Attack*, §§ 2, 3;
Smith vs. *Clay*, Amb. 647;
Enochs vs. *Harrelson*, 56 Miss 468;
Payne vs. *Beech*, 2 Tenn. Ch. 709;
Brewer vs. *Bowman*, 3 J. J. Marsh. (Ky.) 493;
Prentiss vs. *Paisley*, 25 Fla. 927;
Evans vs. *Clement*, 14 Ill. 206;
Carey vs. *Giles*, 10 Ga. 9, 22;
Handy vs. *Cobb*, 44 Miss. 702;
McCall vs. *McGurdy*, 69 Ala. 71.

These authorities could be multiplied indefinitely.

In *Brewer* vs. *Bowman*, 3 J. J. Marsh., 493, the Court said:

"There are two causes for which bills of review may be prosecuted: 1. Errors apparent upon the face of the record. * * * Bills of review of the first-class cure errors in a manner analogous and equivalent to the remedy by writ of error."

In *Prentiss* vs. *Paisley*, 25 Fla. 932, the Court said:

"The purpose of a bill of review is to have the

> Court rendering the decree give the same relief that the appellate Court might under the same circumstances."

It is also thoroughly settled that the only difference between the scope of a bill of review and that of a writ of error or appeal is that in the bill of review only those errors can be reviewed which appear on the face of the record.

In *Dexter* vs. *Arnold*, 5 Mason, 311, the Court says:

> " In regard to errors of law apparent on the face of the decree, the established doctrine is that you cannot look into the evidence in the case in order to show the decree to be erroneous in its statement of the facts. That is the proper office of the Court upon an appeal. But, taking the facts to be as they are stated on the face of the decree, you must show that the Court has erred in point of law."

The Court then uses the language stated on p. 29. above.

In *Whiting* vs. *U. S. Bank*, 13 Peters, 14, the Supreme Court said :

> " It has been suggested at the bar, that no bill of review lies for errors of law, except where such errors are apparent on the face of the decree of the Court. That is true in the sense in which the decree is used in the English practice.
>
> " In England, the decree always recites the substance of the bill and answer and pleadings, and also the facts on which the Court founds its decree.

But in America the decree does not ordinarily recite the bill, or answer or pleadings, and generally not the facts on which the decree is founded. But with us the bill, answer and other pleadings, together with the decree, constitute what is properly considered as the record, and therefore the rule in each country is precisely the same in legal effect, although expressed in different language, viz., that the bill of review must be founded on some error apparent on the bill, answer and other pleadings and decree; and that you are not at liberty to go into the evidence at large in order to establish an objection to the decree, founded on the supposed mistake of the Court in its own deductions from the evidence."

In *Barker* vs. *Barker*, 2 Wood, 242, the Court said:

"It is well settled that a bill of review for error apparent upon the decree must be for error in point of law, arising out of facts admitted by the pleadings or recited in the decree itself, as settled, declared or allowed by the Court."

In *Enochs* vs. *Harrelson*, 57 Miss. 468, the Court said:

"The question presented by a bill of review for error apparent is, whether the decree rendered is supported, taking everything stated by the record, excluding the evidence, to be true. Under our system, all the pleadings, proceedings of record and decree may be looked at on a bill of review for error apparent. The evidence can not be. The authorities to this effect are numerous and need not be cited. They all agree."

The same rule is also stated with great precision in
Tankersly vs. *Pettis*, 61 Ala. 356;
Putnam vs. *Day*, 22 Wall. 66;
Shelton vs. *Van Kleeck*, 106 U. S. 534;
McCall vs. *McGurdy*, 69 Ala. 71.

In *Green* vs. *Jenkins*, 1 De G. F. & J 473, the Court said (by Turner, L. J.):

> "Upon the whole, looking at the authorities, the cases in which bills of review have been allowed, and in which they have been disallowed—the just conclusion appears to me to be that such a bill can not be maintained unless the decree sought to be reversed be contrary to some statutory enactment or to some principle or rule of law recognized or acknowledged or settled by decision, or be at variance with the form and practice of the Court."

On p. 2 of his second brief Mr. Olney avows that, in his search for means to prevent an examination of the decree of which we complain, he has, subsequently to the oral argument, "tried to read all the cases decided "in this country and referred to in the text-books and "digests relating to bills of review". After so exhaustive a search of the entire field, he declares that he has found the long sought for barrier in *Hoffman* vs. *Knox*, 50 Fed. 484, and he introduces that case as such, declaring also (p. 5) that "*Hoffman* vs. *Knox* "was decided by the Circuit Court of Appeals for the "Fourth Circuit, and Chief Justice Fuller rendered the "opinion of the Court".

Hoffman vs. *Knox*, 50 Fed. 484, was a bill of review seeking relief on the ground that certain statutes, of Virginia, which had been followed in making the decree, did not sufficiently comply with a requirement of the State constitution that " no law shall embrace " more than one subject, which shall be expressed in " its title ". The ground upon which the bill of review was held not the proper remedy was stated by the Court as follows (pp. 490, 491):

> " To sustain a bill of review for error of law apparent, the decree complained of must be ' contrary to some statutory enactment, or some principle or rule of law or equity recognized and acknowledged or settled by decision ", etc.
>
> * * * " That principle is that the remedy for mere error in a final decree is by appeal, and that the error apparent for which such a decree may be impeached by bill of review must be more than the result of mistaken judgment."
>
> * * " It is ordinarily held that if the subject of an act be expressed in the title in general terms, it will be sufficient under constitutional provisions like that quoted. The determination of the question whether the title of a particular act is comprehensive enough to reasonably include the several objects which the statute assumes to affect, is one of great delicacy, and upon which opinions might well differ ; and a decree rendered upon one view or the other, while it might be reversed by the appellate Court as erroneous, can hardly be said to carry that error upon its face which is required as the basis of a bill of review.
>
> * * * " The presumption was in favor of the constitutionality of the statute, and the burden of proof on the party setting up its unconstitutionality." * *

Now, let us apply all these tests to the case at bar. The rule of law to be considered is a "statutory enactment" (*Hoffman* vs. *Knox*, 52 Fed. 490), the plain terms of an Act of Congress, namely, of the 1st and 5th sections of the Act of March 3, 1875 (of which the 1st section was amended Aug. 13, 1888), the language (as so amended) being that (section 1) "the circuit courts "of the United States shall have original cognizance " * * of all suits of a civil nature, at common law " or in equity * * * in which there shall be a con-" troversy between citizens of different states" * * * and (section 5) that "if in any suit commenced in a " Circuit Court * * it shall appear to the satisfac-" tion of said Circuit Court at any time after such suit " has been brought * * that such suit does not " really and substantially involve a dispute or contro-" versy properly within the jurisdiction of said Circuit " Court, * * the said Circuit Court shall proceed " no further thereon, but shall dismiss the suit." * *

Such is the statute. It is plain, direct and without even a shadow of ambiguity. Its meaning has been time and again declared by the Courts, and is settled. The question of its meaning can not be said to be "one of "great delicacy and upon which opinions might well "differ". To say that it means the contrary of what it states would be "more than the result of mistaken "judgment". It therefore passes the test of *Hoffman* vs. *Knox*, 50 Fed. 490–491.

Let us pass to the facts. Here all the contents of

the record material to the question are shown in the Transcript (Transcript, p. 9; Rule 23), and are before the Court. We look at the pleadings and the decree. We see that the case involves no right, privilege or immunity of a citizen of the United States, no Federal question or right, and that it is a controversy entirely between citizens of the State of California. It would be enough if only a citizen of the State of California were respectively on each side of the controversy. But here it is more; it is a controversy entirely between citizens of different states, for the citizenship of the beneficiaries is absolutely immaterial. Such are the facts; they appear affirmatively on the face of the decree. There is no possibility of any question whatever, much less is there any "of great delicacy and "upon which opinions might well differ". To deny such facts would be "more than the result of mistaken "judgment". And, as another respect in which the case is the very contrary of *Hoffman* vs. *Knox*, 50 Fed. 490–491, *the presumption is that the United States Circuit Court was without jurisdiction.*

> *Turner* vs. *Bk. of North America*, 4 Dal. 11;
> *Ex parte Smith*, 94 U. S. 456;
> *Robertson* vs. *Cease*, 97 U. S. 649;
> *Bors* vs. *Preston*, 111 U. S. 255;
> *Colo. C. Mg. Co.* vs. *Turck*, 150 U. S. 143.

Such are the facts. Upon the facts, as well as the law, the case, then, passes, with a wide margin, the strictest ~~acts~~ tests of a bill of review. To sustain the decree the Act of Congress necessarily has to be given a

meaning, not merely divergent from, but diametrically the opposite of its true and plainly expressed mandate —as directly the opposite as is the nadir from the zenith, as black is from white, as any conceivable thing is from its diametrical opposite.

All this is apparent upon the face of the decree of which we complain. We therefore say that there is error of law apparent upon the face of that decree.

In *Clark* vs. *Killian*, 103 U. S. 766, a decree setting aside a conveyance as a fraud upon creditors was reversed upon a bill of review. The Supreme Court said (at p. 769):

> * * "The pleadings in that case did not authorize the conclusion, as matter of law, that Schlorle had conveyed, or caused to be conveyed, the property with a fraudulent intention of thereafter engaging in business, or having business transactions, and, in the event of financial embarrassment arising therefrom, to withhold it from his creditors. Taking all the circumstances to be as they are set out in the pleadings, it is perfectly clear that the Court, in adjudging the conveyances of the lots above named to be null and void, and ordering them to be sold in satisfaction of Clark's judgment, erred in point of law. Consequently a bill of review was the proper mode of remedying that error. The present bill was filed in time. (*Thomas* vs. *Harvie*, 10 Wheat. 146.)"

This language of the Supreme Court may, with the utmost precision of application, be transferred to the

case here. This is shown on pp. 53–4 of this Brief.

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8. On p. 20 of his second brief Mr. Olney mentions a case in Georgia where, to quote his words, "a bill of review was dismissed because the party had appealed, though the appeal was dismissed."

This is fully disposed of on pages 20–22 of the appellants' first reply brief. The appellees have not attempted to answer or even criticize what is there stated or the authorities there cited.

When a decree has been reviewed and affirmed on a writ of error, a bill of review will not lie. Nothing less bars the bill of review. The rule is stated and the reason given in

Story Eq. Pl., §408;
Kingsbury vs. *Buchner*, 134 U. S. 671;
Brewer vs. *Bowman*, 3 J. J. Marsh. (Ky.) 493.

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9. On p. 2 of his second brief Mr. Olney objects that though he has since the oral argument "tried to read all the cases cited in this country and referred to in the text-books and digests relating to Bills of Review," he has found only one where it was held that an error of jurisdiction is to be remedied on a bill of review. He does not, however, produce any decision to the contrary.

It would, of course, be of not even the slightest

importance if no bill of review had ever been brought upon this particular error.

Pasley vs. *Freeman*, 3 T. R. 63;
Holleman vs. *Howard*, 119 N. C. 152.

In the following cases, however, a bill of review was expressly held the proper remedy upon the question of the jurisdiction of the Court.

Carey vs. *Giles*, 10 Ga. 22 ;
Parker vs. *Dillard*, 75 Va. 418.

And also in each of the following, already cited:

Ketchum and Wife vs. *Farmers' Loan & Trust Co.*, 4 McLean, 1;
Miller vs. *Clark*, 52 Fed. 900;
Ensminger vs. *Powers*, 108 U. S. 301.

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10. On page 36–39 of this brief, Judge Hayne urges, as he did on his oral argument, that the pleadings in the original suit disclose a controversy between the beneficiaries named as complainants and the trustees Stanly and Purington (p. 37) "as to what property "constituted the trust", and that therefore the suit was a controversy between citizens of different states. To give color to such argument, he now declares (p. 37) that "the final decree expressly states that the cause "was tried '*upon the issues* formed by the original bill "' * * * [*sic*] and the answer of defendants "' Stanly and Purington to said original bill.' "

Such a quotation from the decree changes the mean-

ing of the language, and is of the same character as that (already mentioned) which the learned counsel makes from Section 407 of *Story's Equity Pleading*. The decree affirms nothing of the kind. This will appear when the sentence from which the quotation is taken is read entire.

To make out his point, Judge Hayne not only quotes the decree incorrectly, but misstates the answer of the trustees, Stanly and Purington. On p. 36 of his brief, in stating the difference between the bill and the so-called "answer" of the trustees, Judge Hayne says:

> * * "Such controversy relates to the amount of property in the hands of the trustees. * * The trustees stood charged with having in their hands a certain amount of property. Their answer denies that they had as much property as charged."

The "answer" of the trustees, Stanly and Purington, is shown at pages 53–55 of the Transcript. It expressly declares all the allegations of the bill to be true, save only that two parcels of the land, which the so-called "answer" particularly describes, "were sold and con-"veyed by them during the lifetime of the said "Catherine M. Garcelon, and that they do now hold "the consideration money received therefor". (Tr. p. 55.)

The sale of the two parcels of land and the receipt and retention of the "consideration money", as the property of the trust, in lieu of the land so sold—all

precisely as so stated in the "answer" of the trustees—was expressly provided for in the deed of trust set out and alleged and declared valid in the original bill. (Exhibits pp. 41–42.) It could, therefore, according to the bill itself, be no possible concern of the beneficiaries whether such conversion of those two parcels of land into money had ever been made or not.

To say that there is a difference between the bill and the so-called "answer" of the trustees as to the "amount of property in the hands of the trustees," is to state the "answer" of the trustees incorrectly. The two parcels of land having been sold and converted into money, and the consideration money having been received by the trustees and being held by them as property of the trust, in lieu of the parcels of land sold—all this leaves the "amount of property in the hands of the trustees" precisely the same as stated in the bill. There is, therefore, in strict truth, no difference whatever between the bill and the so-called "answer" of the trustees Stanly and Purington.

There was no such issue in the pleadings, nor anywhere in the record; nor was there any controversy between the beneficiaries named as complainants and the trustees, nor was any decree against the trustees either made or asked for or within the competency of the Circuit Court to make.

In *Cilley* vs. *Patten*, 62 Fed. 499, the Court said:

> "The Court not only may, but most assuredly should, for the purpose of determining its juris-

diction over the controversy, look to the real interests of the parties, in order that it may know whether the parties adversely arranged on the record have a real and substantial controversy, such as the statute contemplates, or whether the controversy is fictitious, and therefore without substance as a basis for assumption of jurisdiction. Jurisdiction depending upon diverse citizenship is founded upon controversial relations, and this means a real controversy as to the facts involved in the suit. Federal jurisdiction is not founded in fiction, nor does it depend upon the arbitrary or capricious arrangement of the parties by the pleader."

In *Hutton* vs. *Joseph Bancroft & Sons Co.*, 77 Fed. 483, the Joseph Bancroft & Sons Company was held to to be a party to the controversy which was the subject-matter of the suit, and on the opposite side from that of Bloede, named as its co-defendant, and yet there was, between its "answer" and the bill, a discrepancy which the Court states as follows (p. 483):

"The separate answer of the Joseph Bancroft & Sons Company admits all the allegations of the bill, save the one charging it with having exceeded its authority in purchasing the stock of the Bloede Company, which it neither admits nor denies, but submits to the judgment of the Court."

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11. On pages 38–39 of his brief Judge Hayne urges that the previous refusal of the trustees to bring by themselves a suit to quiet their title, though accepted and acquiesced in by the beneficiaries and though the

express terms of the declaration of trust left them to bring such a suit or not, in their " uncontrolled dis- " cretion " (Exhibits p. 53), nevertheless made the suit a controversy between the beneficiaries and the trustees and therefore a controversy between citizens of different States. He supports his contention by quoting from *Shelton* vs. *Platt*, 139 U. S. 599, and *Dodge* vs. *Woolsey*, 18 How. 346. He quotes *Dodge* vs. *Woolsey* (p. 39), declaring that the Court there " stated that *the refusal* " *of the trustees to sue* caused them and the beneficiary " to ' occupy antagonistic grounds in respect to the " ' controversy which their refusal to sue forced him to " ' take in defense of his rights ' ". Mr. Olney on p. 39 of his first brief urges the same contention.

It should be borne in mind that *Dodge* vs. *Woolsey*, 18 How. 346, was decided in 1855, and that it was not until more than twenty years later that, upon the question of the jurisdiction, by the United States Circuit Court, of a suit upon a controversy between citizens of different States, the Courts for the first time found occasion to even notice the principle of ascertaining the controversy litigated in the suit and arranging the parties according to their respective interests. The pioneer case in which this principle was considered was that of *Commissioners of Arrapahoe County* vs. *Kansas Pac. Ry. Co.* 4 Dill. 277, decided by Justice Miller in 1877. And as Judge Hayne on p. 44 of his brief, himself admits, the point was not mentioned in the Supreme Court until the *Removal Cases*, 100 U. S. 457,

decided in 1879. It would therefore be unreasonable to expect light upon the point from *Dodge* vs. *Woolsey*, 18 How.

But in *Dodge* vs. *Woolsey*, the Court did not say or hold that " *the refusal of the trustees to sue* " was the cause of any such antagonism. On the contrary, the cause was, as stated by the Supreme Court in *Shelton* vs. *Platt*, 139 U. S. 599, " the refusal of the directors *to resist the collection of a tax* ", and in *Hawes* vs. *Oakland*, 104 U. S. 458, it is stated that in *Dodge* vs. *Woolsey* " *the tax is so onerous upon the bank that it will* " *compel a suspension and final cessation of its business* ".

In *Hawes* vs. *Oakland*, 104 U. S. 450, the Supreme Court has distinguished *Dodge* vs. *Woolsey* and shown that it is not the authority which Judge Hayne asserts it to be, and has pointed out (pp. 458–9) that " it is " impossible not to see the influence on the mind of the " writer of that opinion of the fact that the only ques- " tion on the merits of the case was one which pecu- ' liarly belonged to the Federal judiciary, and especi- " ally to this Court to decide, namely, whether the con- " stitution of the State of Ohio violated the obligation " of the contract concerning taxation found in the " charter of the bank ", and that, " as the law then " stood there was no means by which the bank, being " a citizen of the same State with Dodge, the tax col- " lector, could bring into a Court of the United States " the right which it asserted ", * * * and that " that difficulty no longer exists ". * * *

The simple manifest truth is the answer to Judge Hayne's contention on this point. The " controversy " between citizens of different States " the jurisdiction (*i. e.* the power to hear and determine) which is by the Act of Congress (25 U. S. Stats. 434) given to the Circuit Courts, is the controversy litigated in the suit, the controversy which the Court is to hear and determine and to decide either the one way or the other.

In the original suit *(Bowdoin College* vs. *Merritt)* some of the beneficiaries in an alleged trust brought a certain controversy concerning the title to the trust property into the United States Circuit Court and asked to have it heard and determined. The refusal of the trustees to sue was no part of that controversy. It was merely a fact which permitted the beneficiaries to take the actual controversy into the Court having jurisdiction of it and to have it there heard and determined.

Now, what is the controversy which, in their bill, the beneficiaries named as complainants bring into Court to be there heard and determined? It is not a controversy with *them*—it is not a controversy to which *they* are parties. Their connection with the controversy is not that they are *parties to it*, but solely that, inasmuch as they are some of the beneficiaries of the trust, they have an *equitable interest* to have the controversy heard and determined. They say, then, in their bill, " We bring here a controversy between John A. Stanly " and Stephen W. Purington, citizens of the State of " California, and trustees of certain property, on the

" one side, and certain persons, citizens of the State of
" California who, on the other side, are disputing against
" them the title to that property; it is to our interest to
" have that controversy heard and determined, and the
" trustees, by themselves refusing to bring it into the
" Court having jurisdiction of such a controversy, have
" permitted us to bring it into and have it heard and
" determined by such Court as has jurisdiction of it."

To this, the Court, being " the mere instrument of
" the law " (*Osborn* vs. *U. S. Bank*, 9 Wheat. 866),
always " giving effect to the will of the Legislature, or
" in other words, to the will of the law " (*Id.*) must
answer: " The subject-matter of the suit being, accord-
" ing to your own bill, a controversy between the
" trustees, citizens of the State of California, on the
" one side, and, on the other side, certain citizens of
" the State of California who are disputing against
" them the validity of their title, is a controversy be-
" tween citizens of the State of California, and therefore
" not a 'controversy between citizens of different
" ' States'. The suit is therefore not within the jur-
" isdiction of a United States Circuit Court; ' the said
" ' Circuit Court shall proceed no further therein, but
" ' shall dismiss the suit.' "

So identical in principle is the case of *Clark* vs.
Killian, 103 U. S. 766, with the case at bar, that the
language of the decision quoted on p. 44 of this
brief, if transferred to the case here, applies with the
utmost precision. The only change required is a sub-

stitution of the words which designate the decree, thus:

> "The pleadings in that case did not authorize the conclusion, as matter of law, that [the Court had jurisdiction of the suit.] Taking all the circumstances to be as they are set out in the pleadings, it is perfectly clear that the Court, in adjudging [that it had jurisdiction of the suit], erred in point of law. Consequently, a bill of review was the proper mode of remedying that error. The present bill was filed in time."

It is only the *simple and plain truth* that is the basis of the decisions.

In *Cilley* vs. *Patten*, 62 Fed. 499–500, the Court said:

> "Jurisdiction depending upon diverse citizenship is founded upon controversial relations, and this means a real controversy as to the facts involved in the suit."

In *Covert* vs. *Waldron*, 33 Fed. 312, the Court says that the controversy to be considered is "the matter in "dispute".

In *Ayres* vs. *Wiswall*, 112 U. S. 191, the Court said:

> "The mortgage and the debt it secured presented the subject-matter of the controversy in the case."

In *Thayer* vs. *Life Association*, 112 U. S. 719, the

Court said:

"Whether he had a right and was under a duty to sell the property was the controversy in which all the parties to the suit were interested."

In *Shipp* vs. *Williams*, 62 Fed. 5–6, the Court said:

"The jurisdiction is to be determined in all such instances by the citizenship of the trustee. *Coal Co.* vs. *Blatchford*, 11 Wall. 172. Neither is the rule changed by the refusal of the trustee to act. His refusal may authorize the beneficiary to exhibit a bill," etc.

In *Board of Trustees* vs. *Blair*, 70 Fed., the Court said (pp. 416–417):

"It is the duty of the Court, independent of plea or motion, under the provisions of section 5 of the act of March 3, 1875 (18 Stat. 470, 472), to examine the case and see if it rightfully has jurisdiction of the matter presented to it by the bill. * *

"In the case as now submitted I must look to the bill alone, in order to determine the character of the controversy. * *

"What is the real controversy in this case?" * *

In *First Nat'l. Bank* vs. *Radford Trust Co.*, 80 Fed. 573, the Court said:

* * "Where the jurisdiction of the United States court is dependent alone upon diversity of

citizenship, the parties should be arranged with reference to the real controversy presented by the pleadings, and not according to the arbitrary arrangement of the pleader. This is well settled." * *

In *Pittsburg, etc. Ry. Co.* vs. *Baltimore, etc. R. R. Co.*, 22 U. S. App., the Circuit Court of Appeals said (pp. 365–6):

* * "Did the Circuit Court have jurisdiction of the controversy arising on the pleadings? Is the real controversy wholly between, *etc.*, *etc.*? * * * In determining a question of jurisdiction, where it depends upon citizenship, it is unimportant that the pleader has put a particular party upon the one or the other side of the case. Jurisdiction in such cases depends not upon an arbitrary arrangement of the parties by the pleader, but upon their arrangement according to interest." * *

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12. It is to support his argument last mentioned, that Judge Hayne urges (p. 39) that the refusal (stated in the original bill) of the trustees Stanly and Purington to bring a suit of their own to quiet their title.

* * * "would have authorized the Court to remove the trustees who had been so recreant to the requirements of their position as to refuse to protect the trust against the imminent peril which threatened it, or would at any rate have warranted the Court in refusing any compensation to the trustees, or possibly in decreeing that the costs, expenses and counsel fees of the complainants should be charged against the compensation of the trustees."

The answer is, of course, plain. The Circuit Court neither did, nor was it asked to do, nor could it have done, if it had been asked, anything of the kind. The decree and pleadings show affirmatively that there was no such controversy in the case, and not so much as a shadow of foundation for any such relief.

It is in the same connection, that Judge Hayne urges on pages 33–34 of his brief, and again on page 41, that possibly some of the beneficiaries did not wish the suit brought, and that, as the trustees Stanly and Purington were as much trustees for them as for those who brought the suit, there is here a possibility that the trustees were on the same side of the controversy as those disputing against them the title to the trust property. " What warrant would the Court have," he gravely asks (p. 41) " for saying that where " the beneficiaries are divided the trustees should " coalesce with one faction rather than with the " others?"

The answer to this is in the original bill and in the trust deed and declaration of trust which are there set out as exhibits 5 and 6. It is there shown that the alleged trust is a trust of property and that the trustees Stanly and Purington are not trustees of the various private affections of each particular beneficiary.

It is in the same connection, that Judge Hayne urges

(pp. 33–34) that possibly the trustees Stanly and Purington did not, in their secret hearts, value as they ought to have done a decree quieting their title to the property against those claiming it against them, and that if such had been their secret feelings, they would have been opposed to themselves in their own controversy, which was the subject-matter of the suit.

To this there is of course the same answer. The alleged trust is a trust of property, not of the secret thoughts in the hearts of the trustees. Although the suit was for the benefit of the trustees, it was a suit to quiet their title to the trust property, not to quell the truant fancies making riot within the breasts of the trustees.

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13. On p. 33 of his brief, Judge Hayne attempts to show that, upon the question of the jurisdiction of the United States Circuit Court, the position of the trustees in respect of the controversy which is the subject matter of the suit is not to be considered, because (as he says):

> " The trustee has no real or beneficial interest in the property. The interest of the beneficiaries is a radically different kind of interest."

But the Civil Code of California expressly declares (Sec. 863) that:

> * * " Every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the

> trust. The beneficiaries take no estate or interest in the property" * * *

Besides, in the case at bar, the trust deed, set out as part of the bill in the original suit, expressly declares that it vests the entire property in the trustees Stanly and Purington, and the survivor of them, that they have the full and absolute power of disposition of it so as to convey a perfect title, that purchasers may buy it of the trustees alone, entirely ignoring the beneficiaries, and that such sale is equally valid irrespective of whether the consideration money is or is not properly accounted for by the trustees.

Exhibits, pp. 34, 41–42.

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14. It is in connection with the point last mentioned that the argument of Judge Hayne has broken into open revolt, deserted his colors, and come over in a body to the appellants. After urging that the trustees Stanly and Purington were only nominal parties, and saying that "the general rule is that where "no relief is prayed against a party he is a nominal "party merely", he says, on p. 43 of his brief:

> "There is an exception to this rule where the decree which is sought will necessarily affect the property of such party. A familiar example of this is the case of a corporation whose stockholder comes into Court upon its refusal to act. But the corporation has both the legal and an equitable right to its property, and does not sustain the

> same relation to its stockholders that an ordinary trustee of the legal title holds to his beneficiary."

Here the learned counsel, caught by his own argument, confesses that, in the case of a suit by a stockholder of a corporation, upon a cause of action of the corporation and for its benefit, the corporation is an indispensable party, and that its citizenship is to be considered in determining whether the controversy is one between citizens of different States and as such within the jurisdiction of the United States Circuit Court, *because*, as he confesses, " *the corporation has both the* " *legal and an equitable right to its property* ". Turning now to Section 863 of the Civil Code and the trust deed (which are respectively quoted and referred to on pp. 58–9 of this brief) we find *the trustees Stanly and Purington* (*and the trustee Stanly as the survivor*) *to occupy precisely that same position.*

Ratio legis est anima legis
Eadem est ratio, eadem est lex.

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15. On pages 24–27 of his second brief Mr. Olney urges that the trustees Stanly and Purington were " merely nominal or formal parties ". On pages 42–44 of his brief Judge Hayne makes the same contention. On p. 24 of his second brief Mr. Olney *asserts* that: " The action can proceed without the trustee, and as " full relief obtained as if he were not a party." On p. 44 of his brief Judge Hayne *asserts* that: " It would

"have been proper to make the same decree if the "trustees had not been joined at all ."

These assertions of appellees' counsel are, however, *mere assertions.* They cite no authority, nor could they have cited any. No authority in support of any such contention can anywhere be found.

On the contrary it is thoroughly settled, upon both principle and authority, that the decree could not have been made without the presence of the trustees as parties to the suit, that the trustees were not merely nominal or formal parties, but indispensable parties, and that upon their side of the controversy, it was their citizenship and theirs alone that was material to the question of the jurisdiction of the United States Circuit Court.

Civil Code of Cal. §863 (quoted on pp. 58–9 of this brief;
Mallow vs. *Hinde*, 12 Wheat. 194;
Shields vs. *Barrow*, 17 How. 139;
Coal Co. vs. *Blatchford*, 11 Wall. 175–177;
Knapp vs. *Railroad Co.*, 20 Wall. 123–4;
Gardner vs. *Brown*, 21 Wall. 40;
Thayer vs. *Life Association*, 112 U. S. 719;
Peper vs. *Fordyce*, 119 U. S. 471;
Wilson vs. *Oswego Township*, 151 U. S. 62–65;
Construction Co. vs. *Cane Creek*, 155 U. S. 285;
Shipp vs. *Williams*, 62 Fed. 6.

A comparison of Section 863 of the *Civil Code* of California and the trust deed and declaration of trust (Exhibits pp. 34–60) with the language of the following

decisions, will show that they also depend upon and expressly declare the same principle, namely:

Davenport vs. *Dows*, 18 Wall. at p. 627;
St. Louis, etc. Ry. Co. vs. *Wilson*, 114 U. S. at p. 62;
Porter vs. *Sabin*, 149 U S. at p. 478.

Substituting the words trustee and beneficiary respectively in place of the words " corporation " and " shareholder ", the following language of the Supreme Court in *Davenport* vs. *Dows*, 18 Wall. at p. 627, is applicable with strict truth to the case at bar. The Court there said:

> " The relief asked is on behalf of the corporation, not the individual shareholder, and if it be granted, the complainant [shareholder] derives only an incidental benefit from it."

Not only were the trustees Stanly and Purington indispensable parties, but, on their side of the controversy, they were the only indispensable parties and the only parties whose citizenship is material to the question of the jurisdiction of the suit by the United States Circuit Court. The citizenship of the beneficiaries is utterly immaterial. If every beneficiary had been a citizen of California the absence of jurisdiction would have been no more complete than it is. If every beneficiary had been a citizen of some other State than California, that would not have given jurisdiction to the United States Circuit Court. The controversy is with the trustees and with them only; it is the controversy of the trustees, and theirs only; and it is their citizen-

ship and theirs only that is material. This has long been fully settled.

> *Barnafee* vs. *Williams*, 3 How. 573;
> *Coal Co.* vs. *Blatchford*, 11 Wall. 175–7;
> *Knapp* vs. *R. R. Co.*, 20 Wall. 123–4;
> *Gardner* vs. *Brown*, 21 Wall. 40;
> *Kerrison* vs. *Stewart*, 93 U. S. 160–161;
> *Meeks* vs. *Olpherts*, 100 U. S. 564, 569;
> *Shaw* vs. *Railroad Company*, 100 U. S, 605;
> *Vetterlein* vs. *Barnes*, 124 U. S. 169;
> *Dodge* vs. *Tulleys*, 144 U. S. 455–6;
> *Shipp* vs. Williams, 62 Fed. 5.

In *Shipp* vs. *Williams*, 62 Fed. 5, this is stated thus:

> * * * "If a trustee is, by his citizenship, qualified to sue in a Federal Court, the citizenship of the beneficiary under the trust is wholly unimportant. If the trustee is disqualified by reason of citizenship in the same State as that of the necessary defendants, the suit can not be entertained, even though the beneficiary might be qualified. The jurisdiction is to be determined in all such instances by the citizenship of the trustee *Coal Co.* vs. *Blatchford*, 11 Wall. 72. Neither is the rule changed by the refusal of the trustee to act."

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16. On pages 44–58 of his brief Judge Hayne—going beyond his oral argument—professes to review and distinguish the cases cited by the appellants upon error in law apparent upon the face of the pleadings and decree. He declares (p. 44) that the cases he there reviews are the cases *cited by the appellants*, and among them he reviews (pp. 46, 48,) *Williams* vs. *Nottawa*,

104 U. S. 209; *Detroit* vs. *Dean*, 106 U. S. 540, and *Cashman* vs. *Amador Co.*, 118 U. S. 58, and concludes that those cases are inapplicable. On p. 57 (at the foot) he repeats the assertion that the cases he has reviewed are " the list of cases cited for the " appellants".

But we have not cited either *Williams* vs. *Nottawa*, *Detroit* vs. *Dean* or *Cashman* vs. *Amador Co.* upon any such point, and we have not even so much as mentioned *Cashman* vs. *Amador Co.*, 118 U. S. 58.

The authorities cited by us upon the point are given on pp. 49–50 of the opening brief and on p. 17 of the reply brief.

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17. A like unsoundness is patent in the distinctions which Judge Hayne and Mr. Olney respectively make between the various cases cited by the appellants and the case at bar.

In Mr. Olney's second brief (p. 25) he distinguishes *Shipp* vs. *Williams*, 62 Fed. 4, by asserting that the suit was one " requiring the trustees to sell the prop- " erty in order to carry out the trust ". But the assertion is incorrect. The suit was for a foreclosure and sale. The sale would have been as much under the control of the *cestuis que trust*, named as complainants, as would have been the suit.

Judge Hayne distinguishes *Shipp* vs. *Williams* con-

trary-wise from Mr. Olney, saying (p. 57): The money " would have been paid to the trustees, and hence the " decree would have to run in their favor". But this makes the case the same as that the decree in which is here sought to be reviewed. Here the quieting of the title is for the trustees, and the decree *does* "*run in their favor*".

On pp. 50–51 of his brief Judge Hayne attempts to make a like distinction between *Commissioners*, *etc.* vs. *Kans. Pac. Ry.* 4 Dill. 277 and the case at bar, and he in like manner succeeds in there making the cases precisely alike.

On p. 44 of his brief Judge Hayne asserts that the decree complained of in the case at bar " does not affect " any right of the trustees or affirmatively affect any " right of the trust". This is palpably incorrect. The decree establishes in the trustees, and confirms to them, the title to the property; it is a decree strictly in favor of the surviving trustee and against those disputing his title. Judge Hayne himself is compelled to recognize this in the very next sentence, for he there says: " It simply enjoins further prosecution " of certain unjust attacks upon the trust."

On p. 54 of his brief, Judge Hayne asserts that *Cilley* vs. *Patten*, 62 Fed. 498 was a decision " upon the evidence". But the very passage of the opinion which he there quotes states that the want of jurisdiction was

" *disclosed by the pleadings* as well as the evidence".

On p. 53 of his brief Judge Hayne distinguishes *Rich* vs. *Bray*, 37 Fed. 273, by insisting that in that case " no reason was alleged in the bill for the joinder of " the party as defendant". But this is also true in the case at bar. The bill in *Bowdoin College* vs. *Merritt* alleges no reason for the joinder of the trustees Stanly and Purington as defendants. It alleges no request to them to join as plaintiffs, nor any refusal so to do.

The only request to the trustees, and the only refusal on their part, was limited to their bringing a suit of their own. The entire language to be found anywhere in the record, relating to a request to the trustees or to a refusal by them, is in the original bill, as shown on p. 37 of the Transcript, and is as follows:

> " Your orators and oratrices allege and aver, that they have requested the said Stephen W. Purington and John A Stanly, as trustees, as aforesaid, to institute such action, suit or proceedings against the defendants, the said James P. Merritt and Frederick A. Merritt and their confederates, as would be necessary to quiet their title to the real estate so conveyed to them in trust as aforesaid or to secure a perpetual injunction restraining the said James P. Merritt and Frederick A. Merritt and each of them from violating their repeated covenants, promises and agreements made with the said Catherine M. Garcelon, as is hereinbefore stated, and to secure a specific performance of said covenants, promises and agreements, and the said Purington and Stanly have declined to

> accede to this request of your orators and oratrices; that by reason of such refusal your orators and oratrices are compelled to institute this suit, which your orators and oratrices do, not only in their own behalf, but on behalf of all other beneficiaries of said trust who may elect to join your orators and oratrices herein."

On pages 46 and 47 of his brief Judge Hayne distinguishes three of the cases cited by us by saying that in those cases the facts concerning jurisdiction appeared "*on the face of the pleadings*"— "*as the case stood upon the pleadings*"—"*As the case stood upon the pleadings*," therefore, there was no jurisdiction, etc.

But this is also true of the case at bar.

On page 41 and again on page 52 of his brief Judge Hayne asserts that in determining between whom the controversy in the suit exists, the United States Courts "do so for the purpose of *sustaining their jurisdiction*". Here Judge Hayne makes against the Federal Courts the same accusation which St. Paul says was "slanderously reported" concerning him, and which, he declares, would, if true, have placed him with those "whose damnation is just". (Romans 3: 8.)

That such an accusation against the courts of the United States is untrue, may be seen clearly in the decisions cited on pages 49–55 of the appellants' opening brief and on p. 17 of the reply brief. Of twenty-one representative cases bearing directly on the point and there cited, the jurisdiction of the United States

Circuit Court was found to exist in seven, and in fourteen was found not to exist. In none of those decisions can there be perceived any effort to make out a case for either party, any "*purpose of sustaining the jurisdiction.*" Of all of them it may be truthfully said, as Sir Edward Coke said of the "*rectum*" guaranteed in *Magna Charta*, "hereby the crooked cord of that which is called discretion appeareth to be unlawful, unless you take it as it ought to be, "*Discretio est discernere per legem, quid sit justum*" (Coke's Inst. Vol. 2, 56.)

What conceivable reason can be given in such a case for a "*purpose of sustaining the jurisdiction?*" The suit was not brought to vindicate or support any Federal right, nor could it possibly effect any such result. On the contrary, its actual and sole possible effect, as manifest and openly avowed, was to violate and destroy the rights of the appellants, as citizens of the United States, to seek justice in the Courts of the State,--to violate and destroy the guaranty of the Constitution of the United States that no State shall deny to any person within its jurisdiction the equal protection of its laws.

On p. 55 of his brief, Judge Hayne distinguishes *Board of Trustees* vs. *Blair*, 70 Fed. 414, by saying that "*it did not appear that they* [the trustees] *had* "*refused to sue*". On p. 56 he distinguishes *Hutton* vs. *Joseph Bancroft & Sons Co.*, 77 Fed. 481, in the same way. On p. 57 he distinguishes "a number of

" cases", without specifying what particular ones they are, by saying that in them " *the trustee brings the* " *suit* ".

It is of course of not even the least importance who " brings the suit". The controversy is not —as Judge Hayne and Mr. Olney are fain to claim—a mere cloud, a changing form, now " like a camel", now " like a " whale", now " back'd like a weasel", and to be given, at arbitrary will, any shape or character it may suit one's purpose to assert By whomsoever the suit is brought, the question of the jurisdiction of the United States Circuit Court is the same, namely: What is the controversy, the matter in dispute, which constitutes the subject-matter of the suit ?—Between whom is that controversy ?—Of what States are they citizens ? —Is it a controversy between citizens of different States ? And the only importance of a refusal of the trustees to begin a suit of their own is to permit the beneficiaries to bring one. In either case, the jurisdiction of the United States Circuit Court depends solely upon what is the controversy, what is the matter in dispute, and whether it is a controversy between citizens of different States. * * "the mere fact that he is placed as defendant, instead of plaintiff, in a suit in chancery, never changes his relation to the controversy in the case." * *

Commissioners of Arrapahoe Co. vs. *Kan. Pac. Ry. Co.* 4 Dill. at p. 285;
Shipp vs. *Williams*, 62 Fed. 5–6.

After stating on p. 44 of his brief, that what he is about is " to review the authorities upon the general " question of arrangement or alignment of the parties " for the purposes of jurisdiction", Judge Hayne begins on p. 58 " to take up the authorities on our [the " appellees'] side". And he then says (p. 58) that " The leading case is *Dodge* vs *Woolsey*, 18 How. 331", and he then proceeds to discuss that case.

But, shortly before reaching p. 58 of his brief—shortly before attempting to open fire from *Dodge* vs. *Woolsey*—the learned counsel has, with his own hand, spiked his gun. On p. 44 he himself declares that " the doctrine of the alignment or arrangement of par-" ties was first announced in the Supreme Court of the " United States in the *Removal Cases* (100 U. S. 457)" —that is, not until *twenty-four years after Dodge vs. Woolsey, 18 How. 331, was decided.*

On pages 58–66 of his brief, Judge Hayne cites and comments upon and quotes from a list of cases, calling them " the authorities on our [the appellees] side". After proceeding for four pages, he himself confesses (p. 62) that, " If all of those cases are not directly in " point, at least some of them are", and does not claim any particular one as being in point. It is plain from his own review that (except *New Jersey R. R.* vs. *Mills*, 113 U. S. 256, and *Belding* vs. *Gaines*, 37 Fed. 817,

which are cited by us and fully sustain our argument) none of the cases so produced by Judge Hayne has any bearing on the question before the Court. As to his assertion at the end (p. 66) that: "From this review "of the cases we submit that the most the learned "counsel can claim is that the decisions are conflict-"ing"—it is plain that the conflict to which Judge Hayne refers is upon the question as to what circumstances are sufficient to permit a beneficiary or stockholder to bring a suit for the benefit of the trustees or the corporation, and not upon the question whether the United States Circuit Court would have jurisdiction of the suit.

The question whether the beneficiaries were entitled to bring suit to quiet the title of the trustees to the trust property, is immaterial to the case at bar. Conceding that it was permissible for them to bring and maintain such a suit, they would still be obliged to bring it in the Court having jurisdiction of the subject-matter, *i. e.*, in a Superior Court of the State of California, precisely as the trustees would have had to do if they had brought the suit.

But upon the point upon which the question turns, whether there is in the case at bar the error in law apparent upon the face of the pleadings and decree, which is the ground of the bill of review—upon this point there is absolutely no conflict whatever in the authorities. From the year 1877, when the pioneer decision was made by Justice Miller in *Commissioners*

of Arapahoe Co. vs. *Kan. Pac. Ry. Co.*, 4 Dillon, 277, to the present time, the authorities on the point—each recognizing and following the simple and plain truth—are in complete and perfect harmony and unanimous. Twenty-one of such authorities are cited on respectively pages 49–50 of the appellants' opening brief and on p. 17 of the reply brief. Another has been cited in the preceding pages, namely:

Pittsburg, etc. Ry. Co. vs. *Baltimore, etc. R. R. Co.*, 22 U. S. App. 365.

On pages 15–16, 48–49, and 53–54 of the appellants' opening brief—a brief prepared, served and filed under the requirement of Rule 24 of the Court—we stated in advance our position that the controversy which is the subject-matter of the suit is a controversy wholly between citizens of the State of California. We there state that position explicitly and with the extreme of fullness and precision. We there state and show that the controversy is, on the one side, solely that of the trustees Stanly and Purington, and of the survivor of them, and that it is not and was not in any degree whatever the controversy of the beneficiaries named as complainants. We have never departed from that position.

And, moreover, such was the identical position of these appellants and their counsel in the Circuit Court in the original suit. This is expressly stated by Judge

McKenna in his opinion (63 Fed. 214). And Judge Hayne declares on p. 16 of his brief, that he was there and as counsel opposed that contention—a fact which is also stated by the report (63 Fed 213).

Judge Hayne, in his brief, studiously ignores that position of appellants and strives adroitly and at great length to shift the argument to a ground less unfavorable to the appellees. On pages 17–18 he declares that the question is "Whether the Circuit Court should have aligned or arranged the parties so as to place the trustees Stanly and Purington on the complainants' side of the original case." On p. 16 he says: "Judge McKenna called our attention to the decisions as to the alignment or arrangement of parties to the record, which is the very proposition which forms the entire basis of the bill of review." On p. 22 he discusses "the doctrine of alignment or arrangement of the parties for the purpose of federal jurisdiction". On p. 40 he states that the appellants "say that the trustees must be aligned or arranged as parties complainant", etc. On pp. 41–2 he asks gravely: "What warrant would a Court have for saying that where the beneficiaries are divided the trustees should coalesce with one faction rather than with the other?" On p. 45 he discusses the "alignment or arrangement of parties," etc. On p. 47 he asserts it to be a question of "arrangement or alignment". On p. 52 he distinguishes a case by saying that the party "*aligned himself upon the side of the complainants*", and on p 55 another case by saying

that "there was no question of arrangement". On pages 55 and 56 he asserts it to be a question of "alignment". On p. 41 he says: "It is true that the Courts have frequently arranged or aligned parties", etc. In such expressions his brief abounds. Nowhere does he recognize the true position of the appellants as stated in the opening brief and above mentioned. And, while thus seeking adroitly to shift the argument to a ground less unfavorable to the appellees, he seeks to involve that with dark and mysterious discussions "under the rules of equity pleading", (See, for example, pp. 20–21 and 40–41) Mr. Olney also avoids any recognition of the appellants' actual position. And on p. 24 of his second brief, he says: "In no such case as that can the "Court arbitrarily arrange the trustee along with the "complainant", etc. And on p. 25 speaks of "the "cases cited by the appellants here, where the Court has "arranged the parties and placed the trustees on the "same side with the beneficiaries", etc. And on p. 26 "he says "that it would be most unjust for the Court "to arbitrarily arrange the trustees on the side of the "complainants", etc. And along with all this, Judge Hayne *asserts* (p. 44) that "the decree made does not "affect any right of the trustees" and that "It would "have been proper to make the same decree if the "trustees had not been joined at all." And Mr. Olney, in his second brief (p. 24) also *asserts* that "The action "can proceed without the trustee, and as full relief "obtained as if he were not [*sic*] a party" and that

(p. 24) "The trustee is therefore a mere formal though "necessary party." And, along with all this, Judge Hayne and Mr. Olney make the contentions (reviewed in the preceding pages) that a part of the controversy which was the subject-matter of the suit was a dispute as "to the amount of property in the hands of the "trustees" (Mr. Hayne's brief p. 36) and as to "a breach "of trust on the part of the trustees", (Id. p. 38.)

The evident purpose of thus avoiding the position of the appellants, and of so misstating the question, and of the use of the expressions indicated, and of contending that the case was a suit by the beneficiaries named as complainants against the trustees Stanly and Purington—the evident purpose is to make it appear—to have it *assumed*—that the beneficiaries named in the original bill as "complainants" were not only parties to the suit, but also—an entirely different matter—parties to the controversy which is the subject-matter of the suit. They seek adroitly to have it *assumed* that the controversy stated in the original bill, supplemented bills and decree, is a controversy between, on the one side, the beneficiaries so named as complainants and, on the other side, the persons alleged to be disputing against the trustees Stanly and Purington the title to the property,—to have it *assumed* that the controversy was at least *partly* between citizens of different states; and, thereupon, having won half the field by strategic approach, to hold the remainder by stoutly claiming it and filling it with feigned pretended con-

troversies and so befogging it with mystery as to obscure the error of law, the utter absence of jurisdiction, apparent upon the face of the pleadings and decree.

The answer is the simple truth, the manifest and unavoidable truth. It was stated clearly and proved at the outset in the appellants' opening brief. It is stated clearly on pages 42–43 and pages 52–53 of this brief. It is proved by the authorities last cited, (pp. 61–65 *supra*). It is illustrated by those cited on pages 49–50 of the appellants' opening brief and on page 17 of the appellants' first reply brief.

Although, to entitle the appellants to the relief which they seek, it would be enough if the controversy which was the subject-matter of the original suit were only *partly* between citizens of the same State, yet we are no more bound to surrender half the truth than we are to surrender it all. We are entitled to the truth and to the whole truth.

In the case at bar we have "the whole estate in the trustees * *. The beneficiaries take no estate or interest in the property" (Civ. Code §863). The relief asked is on behalf of the trustees, not the beneficiaries, and when granted the complainants derive only an incidental benefit from it. (*Davenport* v. *Dows*, 18 Wall. 627.) The suit, though brought by the beneficiaries, was still a suit to enforce the rights of the trustees (*Porter* v. *Sabin*, 149 U. S. 478). The controversy which was the subject-matter of the suit was solely the controversy of the trustees.

The controversy which was the subject-matter of the suit is solely a controversy between the trustees, Stanly and Purington (and of the survivor Stanly), on the one side, and, on the other, those disputing against them the title to the property owned and held by them as such trustees. The controversy is entirely between citizens of the State of California. This appears affirmatively upon the face of the decree and pleadings.

The sole question in the case is whether a controversy wholly between citizens of the State of California is a controversy between citizens of different States.

It is apparent upon the face of the decree that that decree is a final disposition by the United States Circuit Court of a controversy which involves no Federal right or question and is wholly between citizens of the same State—that the decree was made without jurisdiction.

This is error in law apparent upon the face of the decree.

It should be borne in mind also that upon the question whether the subject matter of the original suit was a controversy between citizens of different States, all the presumptions are that it was not such a controversy.

Turner vs. *Bank of North America*, 4 Dall. 11;
Ex parte Smith, 94 U. S. 456;
Robertson vs. *Cease*, 97 U. S. 649;
Grace vs. *American Central Insurance Company*,

109 U. S. 283;
Bors vs. *Preston*, 111 U. S. 255;
Railroad Company vs. *Swan*, 111 U. S. 382–383;
Colo. C. Mg. Co. vs. *Turck*, 150 U. S. 143.

We may close the point with the language of the Supreme Court, as transferred to the case here, and shown on p. 44 and pp. 53-4 of this brief.

(b) Relating to the Due Time Within Which the Bill of Review Was Filed.

1. In pages 72–76 of his brief—as on his oral argument—Judge Hayne still insists that the time limited by law for filing the appellents' bill of review was limited by the end of the term of the Circuit Court at which the decree sought to be reviewed was made.

While we think such contention more than answered by the considerations stated on pages 20–38 of the appellants' opening brief and pages 2–3 of the first reply brief, we invite attention also to the following language of the courts.

In *Burch* v. *Scott* 1 G. & J. (Md.) 393, 398 (decided in 1829) the Court said:

> "It has been the long established usage and law of the Court of Chancery to consider all its orders and decrees, as completely within its control, and open to be altered, revised or revoked, during the whole term at which they are passed, on motion or by petition. But, if the term is suffered to elapse, the party can obtain relief only by bill of review."

In *Hodges* vs. *Davis*, 4 Hen. & M. (Va.) 400, (decided in 1808), the Court said:

> "The practice, *in England*, is as well settled, that after a *final* decree is *signed* and *enrolled*, the cause cannot be *reheard* but by a *bill of review*, as it is *in this country*, that after a *final* decree, and the term at which it was pronounced has passed, it can not be *reheard*, but in like manner. The cases relied upon unquestionably supported this doctrine, that until a decree is *signed* and *enrolled*, the cause may be reheard by *petition*, but, after it has been *signed* and *enrolled*, it must, if *reheard*, be by a *bill of review*, and so it must here *after a final decree*, and the term has passed at which such decree was pronounced."

In *Smith* vs. *Clay*, Amb. 648 (decided in 1767) the Court said:

> " In this Court, instead of writ of error, the party has two remedies, either by rehearing before inrollment, or bill of review after inrollment."

In *Bramlet* vs. *Pickett*, 2 A. K. Marsh. (Ky.) 10 (decided in 1819), the Court said:

> " After the term has expired during which a final decree has been pronounced, a bill of review is the only legitimate mode by which the same Court can correct any error in the substance of its decree."

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2. On p. 73 of his brief, under the division " a ",

Judge Hayne contends that the reason that would exclude a bill of review from being filed before the end of the term of the Circuit Court at which the decree to be reviewed was made, would equally exclude an appeal from being taken at that time.

The contention is of course unsound. The reason why the bill of review should not be filed then is that the decree is "in the breast of the Court", *i. e.*, of the *Circuit Court*, so that to file a bill of review would be to commit an absurdity. As, however, the decree would not be *in the breast of the appellate court*, any relief in the appellate court would have to be sought by appeal.

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3. On pages 73–74 of his brief, as in his oral argument, Judge Hayne argues that it would be reasonale to limit the time for filing the bill of review to the term of the Circuit Court at which the decree to be reviewed was made, because, as he says on p. 74, "a " mere reservation of the matter for further considera- " tion by some order or permission (which could be " obtained in five minutes) is sufficient to carry the " jurisdiction into succeeding terms".

If by " the matter" Judge Hayne means the bill ot review or the right to file it, the answer is that a bill of review for error of law apparent upon the face of the decree, is filed as a matter of right, and no " order or " permission " can help it out.

Davis vs. *Speiden*, 104 U. S. 83.

And if by "the matter" Judge Hayne means that the right to have a certificate of the question of jurisdiction may be, by motion made before the end of the term at which the decree was made, extended beyond the term, and so the right to appeal kept open, then his argument is that the right to file a bill of review depends upon the right to appeal--that a bill of review cannot be filed except at a time when the right to appeal is still open. Such a contention would of course rest upon a total misconception of the principle upon which lapse of time is held to bar the right to file a bill of review. We need not, however, reason the point, for it is answered, against Judge Hayne's contention, in

Ensminger vs. *Powers*, 108 U. S. 292.

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4. On p. 75 of his brief, Judge Hayne contends that the argument that it would often be impossible to file a bill of review before the expiration of the term of the Circuit Court at which the decree to be reviewed was made, comes to nothing, because the certificate of the question of jurisdiction (making the case appealable) must be made before the end of the term, if made at all, and yet that it might be as difficult to prepare the certificate of the question of jurisdiction as to file the bill of review.

The contention is of course unsound. The certificate is the act of the Court. The bill of review must be

prepared by the party. The time for making the certificate may be continued by the Court. The time to file the bill of review for error of law cannot be extended by the Court, for the right to such a bill does not rest upon permission of the Court but upon the right of the party.

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5. On page 70 of his brief, Judge Hayne contends that if it is the law that the bill of review can be filed after the expiration of the term of the Circuit Court at which the decree to be reviewed was made, " it would " be hard to say why * * the losing party in the " Circuit Court could not have his certificate placed on " file immediately, and then wait during the balance of " the two years to take his appeal to the Supreme Court " of the United States".

The answer is that of course he could. Many such appeals, under the Act of 1891, have been heard and decided in the Supreme Court. And in the case at bar the attempted appeal was not dismissed because taken too late—but solely because the question of jurisdiction had not been certified within the time when the decree was " in the breast of the [Circuit] Court".

See *Merritt* vs. *Bowdoin College*, 169 U. S. 556.

In his brief Judge Hayne also makes severally the following contentions, which, as they all rest upon the same misconception, may be considered together :

6. On page 72, that " he must bring his bill of " review within the time in which he could have taken " an *effective* appeal to the Supreme Court". Here we will consider what the learned counsel *means* rather than what he *says*. What he *says* would concede the right to file the bill of review at any time within two years after the entry of the decree to be reviewed, for it is up to that time that " he could have taken an *effective* " appeal to the Supreme Court". What he *means* is evidently to make the right to file the bill of review to depend upon the existence of a certificate of the question of jurisdiction to the Supreme Court, and to make the right to file the bill of review expire at the same time that the power of the Circuit Court so to certify the question of jurisdiction expires.

7. On pp. 75–76, that, to hold a party entitled to file a bill of review, although at the time he files it he could not have taken an effective appeal, "would do " away with all limitation upon the time to file a bill of " review".

8. On pp. 67–68, in contradiction of his claim that the bill of review must be filed before the end of the term of the Circuit Court at which the decree to be reviewed was made for filing a bill of review must be six months after the entry of the decree to be reviewed, because the "mass of appeals" (p 68), the "mass of the jurisdiction" of cases appealable from the Circuit Court, have to be taken to the Circuit Court of Appeals and that in such cases the appeal must be

taken within six months after the entry of the decree.

9. On page 70, that to claim the right to file the bill of review at any time within two years of the entry of the decree to be reviewed must be wrong, because that is to "maintain that the period for a bill of review " is governed by the period for an appeal to a court *to* " *which the bill of review could not possibly go.*"

Of the contentions of Judge Hayne here specified, those above numbered 6 and 7 respectively are answered by the decision of the Supreme Court in *Ensminger* v. *Powers* 108 U. S. 292, 302–3.

And they are all answered by the decision of the Supreme Court in *Thomas* v. *Harvies' Heirs* 10 Wheat. 149.

All these contentions of Judge Hayne (numbered respectively 6–9 above) rest upon the same misconception of the principle upon which the limit of time for filing a bill of review is fixed. It is the principle of discountenancing laches and neglect (10 Wheat. 149). By this of course is meant laches and neglect *in the particular case*,—not what would be laches and neglect in other and different cases even though such other and different cases might constitute the "mass of appeals" or "mass of jurisdiction"—not what will be the time for appealing from the decree to be afterward made on the bill of review. The question, then, being whether the party has been, *in the particular case*, guilty of laches and neglect, the Court asks what time is

allowed by the Legislature in *cases of that particular kind*, for taking an appeal. In the case under consideration the time so allowed by the Legislature is two years after the entry of the decree to be reviewed. The time so allowed for taking an appeal, is therefore deemed to be the period within which the party is of right entitled to file a bill of review, because

> "Congress has thought proper to limit the time within which appeals may be taken ['taken within two years after the entry of such judgment, decree or order" § 1008 R. S.] in equity causes, thus creating an analogy between the two remedies, by appeal, and a bill of review, so apparent that the Court is constrained to consider the latter as necessarily comprehended within the equity of the provision respecting the former."
>
> *Thomas* v. *Harvies' Heirs*, 10 Wheat. 150.

All the contentions of Judge Hayne last mentioned are also answered by the decisions upon writs of certiorari.

Appellants' Opening Brief p.36.

In his brief, Judge Hayne also makes the two following contentions, which, as they rest upon the same error, may be considered together.

10. On pp 68–69, that, "If the period for appeals to " the Supreme Court be held to govern, there would be " no uniform period for bills of review, but there would " have to be a different period for each bill, according " to the kind of questions which it involved." Here

Judge Hayne argues, in substance, that it is impossible, as a matter of law, that, upon questions appealable to the Supreme Court, a bill of review may be filed within two years, while, upon questions appealable only to the Circuit Court of Appeals, the bill of review must be filed within six months.

11. On page 69, he urges that "To say that the per-
" iod for appeals to this Court [the Circuit Court of
" Appeals] is not the period for a bill of review would
" entail another curious result. The present appeal
" —i. e., the appeal from the decree dismissing the bill
" of review—could under no circumstances go to the
" Supreme court of the United States." etc.

It is of course absurd to suppose that the filing of the bill of review within six months would have enabled " the present appeal " to " go to the Supreme Court " of the United States " any more than now.

But there is this common answer to both the points last mentioned, namely: By the Act creating the Circuit Courts of Appeals, in connection with Section 1008 of the Revised Statutes, Congress has provided that in certain defined cases an appeal from the Circuit Court may be taken to the Supreme Court and within two years, and, in other and defined cases, to the Circuit Court of Appeals and within only six months. And in each respective class of cases, the time for filing the bill of review is the same as that allowed for taking the appeal.

Thomas vs. *Harvies' Heirs*, 10 Wheat. 150.

Judge Hayne's objections are merely a fanciful criticism of the wisdom of the act of Congress. The act of Congress seems wise and destitute of so much as a vestige of hardship. But, whether it is or not, it is the law.

In *Lake County* vs. *Rollins*, 130 U. S. the Supreme Court, adopting the language of the Supreme Court of Illinois, said (at p. 673):

> " The liberty of the citizen, and his security in all his rights, in a large degree depend upon the rigid adherence to the provisions of the constitution and the laws, and their faithful performance. If Courts, to avoid hardships, may disregard and refuse to enforce their provisions, then the security of the citizen is imperiled. Then the will, it may be the unbridled will, of the Judge, would usurp the place of the constitution and the laws, and the violation of one provision is liable to speedily become a precedent for another, perhaps more flagrant, until all constitutional and legal barriers are destroyed, and none are secure in their rights. Nor are we justified in resorting to strained construction or astute interpretation, to avoid the intention of the framers of the constitution, or the statutes adopted under it, even to relieve against individual or local hardships. If unwise or hard in their operation, the power that adopted can repeal or amend, and remove the inconvenience. The power to do so has been wisely withheld from the Courts, their functions only being to enforce the laws as they find them enacted."

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12. On pp. 67–68 of his brief Judge Hayne, in support of his contention for a limitation of six months for

a bill of review, in analogy to that of an appeal to the Circuit Court of Appeals, says that, " in cases, like " this, an appeal to this Court brings up the whole " case, including the question of jurisdiction ".

The bill of review is, however, not upon " the whole " case ", but only upon the absence of jurisdiction.

Where the only question in the case is that of the jurisdiction of the Circuit Court, no appeal to the Circuit Court of Appeals can be taken.

> *Davis* vs. *Rankin B. & Mfg. Co.*, 18 U. S. App. 476;
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> *Cabot* vs. *McMaster*, 24 U. S. App. 571

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13. On pp. 71–72 of his brief, Judge Hayne making an arithmetical calculation, finds that the first appeal was taken in two days less than six months after the entry of the decree to be reviewed, and that the bill of review was filed four days after the second appeal was dismissed, and that, therefore, by adding the four days to the six months minus two days, it appears that there was a sum total of six months and two days within which the bill of review might have been filed. After going through the calculation, he says (p. 72):

> " So that, if I am right in my position that six months is the governing period, there is no question that the bill was too late."

Here, however, Judge Hayne is also in error. In *Townsend* vs. *Vanderwerker*, 160 U. S., the Supreme

Court laid down the rule thus:

At p. 186

> "The question of laches does not depend, as does the statute of limitation, upon the fact that a certain definite time has elapsed since the cause of action has accrued, but whether, under all the circumstances of the particular case, the plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did."

And the Court then said (p. 185):

> "Dealing with a person who stood in this relation to him, and with whom he had always been upon friendly, and even intimate terms, the same diligence could not be expected of him as would have been if he had been treating with a stranger."

And on the same page:

> "We are also of opinion that, under the peculiar circumstances of this case, the bill is not open to the defense of laches."

We submit that even if, in the case at bar, the period for filing the bill of review had been only six months after the entry of the decree to be reviewed, yet that it would have been a clear period of six months; that, relying upon appeals by which they were in good faith and at great expense endeavoring to seek a remedy, the same diligence in filing a bill of review could not be expected of the appellants as would have been if they had not had the misfortune to seek erroneously, though honestly, a remedy by appeal; that, under such circumstances, laches is not shown by the mere fact, that by means of plus and minus arithmetical computations, it appears that a certain definite time of six

months less two days, and afterward a certain definite time of four days, making a sum total of six months and two days, elapsed since the cause of action accrued; and that, under the peculiar circumstances of the case, the bill would not be open to the defense of laches. And, to the same effect, as we think, was the decision in

Ensminger vs. *Powers*, 108 U. S. 292.

The Shortest Possible Limitation is Two Years After the Entry of the Decree to be Reviewed.

In every suit in equity in a Circuit Court of the United States where "the jurisdiction of the Court is in issue" and a decree is pronounced upon the merits, a party against whom such decree is made may of right have the question of the jurisdiction of the Court reviewed by the Supreme Court of the United States. There is a period fixed by law within which such appeal may of right be taken.

And where it is apparent upon the face of such decree that the suit was not within the jurisdiction of the Court, such party, instead of taking such appeal, may of right file in the Court by which such decree was pronounced, a bill of review upon the ground of the error so appearing. The right so to file such bill of review, in such a case, is not new. It has existed from the time the Circuit Courts were first organized. There is a period fixed by law within which, instead of taking such appeal to the Supreme Court, such bill of review

may of right be filed in the Circuit Court. What is that period?

It is absolutely certain that until recently the period was that of two years next after the entry of the decree to be reviewed. Such is the period as it was last ascertained and stated by an authoritative decision.

Clark vs. *Killian*, 103 U. S. 766;
Ensminger vs. *Powers*, 108 U. S. 302;
Knox vs. *Iron Company*, 42 Fed. 380.

If the period is not still two years, then the law has been changed. If it cannot be shown that the law has been changed, then the period is still two years. We start, then, with the presumption that the period is still two years.

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It should be borne in mind also that upon the question whether the bill of review was brought in time, all the presumptions are in favor of the appellants, because:

1. That a party has been guilty of laches and neglect is never to be presumed. The burden, therefore, of showing laches and neglect is upon him who alleges it; and

2. A change in the law is not to be presumed. The burden, therefore, of showing that the law has been changed, is upon him who alleges that it has been changed.

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To show that the law has been changed, to meet the presumption that the period is still two years, to defeat the right of the appellants to the relief they seek, the appellees and every one of their counsel take up two mutually antagonistic positions—two positions, each of which is a flat contradiction of the other.

1. They all contend that the period allowed by law for filing the bill of review was the term of the Circuit Court at which the decree to be reviewed was made, and that such period expired at the end of that term. 2. They all contend also that the period was six months after the entry of the decree to be reviewed. Each of those contentions is necessarily a flat contradiction of the other.

Would we show that the appellees are wrong in their contention that the period is that of six months from the entry of the decree? They themselves confess it; for they say that is not the period, that the period is that ending with the term of the Circuit Court at which the decree to be reviewed was made. Every counsel appearing for an appellee makes the same confession, and in the same way.

Would we show that the appellees are wrong in their contention that the period is limited by the end of the term of the Circuit Court at which the decree to be reviewed was made? They themselves confess it; for they say that that is not the period, that the period is six months from the entry of the decree. Every counsel appearing for an appellee makes the same confes-

sion, and in the same way.

Every party in the case says that the period is not the term of the Circuit Court at which the decree to be reviewed was made. Every counsel who has taken part in the argument says that such is not the period. The appellees and their counsel say it by contending for the period of six months, the appellants by contending for that of two years. All agree, then, that the period is not the term of the Circuit Court at which the decree to be reviewed was made.

Every party in the case says also that the period is not six months. Every counsel who has taken part in the argument says that such is not the period. The appellees and their counsel say it by contending that the period is the term of the Circuit Court at which the decree was made, the appellants by contending that the period is two years. All agree, then, that the period is not six months.

What remains? If the period is neither six months nor the term of the Circuit Court at which the decree to be reviewed was made, then it must be the period of two years next after the entry of the decree, for no other possible period is suggested. When the various arguments are analyzed and classified, it appears, then, that in actual truth all agree that the period within which such bill of review may of right be filed is within two years after the entry of the decree to be reviewed. The appellants affirm this and have demonstrated that it is the true period. The appellees

and their counsel affirm it, for they combat every other hypothesis.

It is absolutely certain that until recently the period fixed by law was that of two years after the entry of the decree to be reviewed. Has the law been changed? The appellants say that it has not, and they have shown that what they say is true. The appellees and all their counsel say that it has not been changed, for it is they themselves who combat every argument that can be suggested as showing that such a change has been made.

No such change is anywhere expressly declared. Can it be reasonably found by argument?

If the law fixing the period has been changed, then it has been so changed as to fix, as the period within which the bill of review must be filed, either (1) the term of the Circuit Court at which the decree to be reviewed was made; or (2) the period within which, as by motion and continuance, it is permissible for the Circuit Court to certify the question of jurisdiction to the Supreme Court; or (3) six months from the entry of the decree.

(1) To argue that the period is that of the term of the Circuit Court at which the decree to be reviewed was made, is open to three objections, every one of which is insuperable, namely:

1. The principle upon which the law fixes the period

is that in every case where the bill is not filed within that time, the party is justly chargeable with laches and neglect. It is manifest that a rule requiring the bill of review to be filed before the close of the term of the Circuit Court at which the decree to be reviewed was made, could not possibly rest upon any such principle, and that for two reasons: first, because there is no reason for filing the bill of review within that time, the decree and suit being still "in the breast of the Court"; and, secondly, because it would measure the period solely by the time of the entry of the decree, a circumstance having no possible connection with laches and neglect in bringing the bill of review.

2. To require the bill of review to be filed before the close of the term of the Circuit Court at which the decree to be reviewed was made, would utterly abolish the remedy by bill of review; for until the close of the term, the decree and suit are still "in the breast of the Court", so that within that period it could be of no possible advantage to the party to file a bill of review. To say that the bill of review must be filed within that period is contradicted by the definition and essential character of the remedy.

3. To require the bill of review to be filed before the close of the term, would often make it impossible to prepare and file it.

(2). To argue that the period is that within which, as by motion and continuances, it is permissible for the Circuit Court to certify the question of jurisdiction

to the Supreme Court, is open to two objections, each of which is insuperable, namely:

1. Such a period could not possibly rest upon the principle that where the bill of review is not filed within that time, the party is justly chargeable with laches; for, by the very definition of the period, the party would then be seeking a remedy by appeal, and hence could not be chargeable with laches and neglect in not filing a bill of review.

2. To argue that such is the period is to argue that the right to file a bill of review depends not upon the absence of laches and neglect in filing it, but upon the existence of a remedy by appeal. Such an argument is not only manifestly unsound in principle but is answered by authority.

Ensminger vs. *Powers*, 108 U. S. 302;
Miller vs. *Clark*, 52 Fed. 900.

(3.) To argue that the period is limited by the lapse of six months after the entry of the decree is open to the insuperable objection that it violates the settled principle by which the true limit of the period is fixed. That settled principle is that the party cannot be justly chargeable with laches and neglect in filing his bill of review, if he has delayed no longer than he would have been entitled to delay taking an appeal in any similar case. That this principle carries the right to file the bill of review beyond the end of the term at which the decree to be reviewed was made, has just been shown. That

it excludes any such limit as that within which, as by continuances, the Circuit Court might certify the question of jurisdiction to the Supreme Court, has also just been shown As the principle excludes both those limits, it necessarily carries the period to the full end of the time allowed by the Act of Congress for the actual taking of an appeal in a like case to the Supreme Court of the United States, which is "two years after the entry of such judgment, decree or order" (§1008 R. S.).

The presence or absence of a certificate of the question of jurisdiction is alike immaterial to the bill of review, and can have no possible bearing upon the question whether the party has been guilty of laches and neglect in filing the bill of review.

It is absolutely certain that until recently the period fixed by law was that of two years after the entry of the decree to be reviewed. We respectfully submit that it has not been fairly shown that that law has been changed. We respectfully submit that the law allowing the bill of review to be filed of right within two years after the entry of the decree to be reviewed is still the law.

(c) **Relating to the Appellants' Status in the Case.**

On pages 7–20 of his second brief—as also in his former brief (pp. 9–17), and in his oral argument—Mr. Olney laboriously asserts and claims that it is the duty

of the Court to close its eyes to the want of jurisdiction of the original suit apparent upon the face of the pleadings and decree, until it has first considered and adjudged the question whether the appellants have respectively a right to question in any Court the validity of the alleged trust, any right to reconvey the property even if the alleged trust conveyances are invalid, and that, having first heard and determined that question, the Court should give judgment upon it against the appellants, and thereupon that each of the appellants, to use Mr. Olney's expressions on the oral argument, should be "taken by the shoulders and turned out of Court". Judge Hayne also, in his brief (pp. 8–15)—as on his oral argument—laboriously urges the same assertions and claims. Mr. Olney also tells the Court in his first brief (pp. 11–15), that he has a plea in waiting, a plea by which, unless successful here, he will interpose in the Circuit Court a like barrier to the bill of review.

It is advisedly that we speak of such contentions of the appellees as assertions and claims, for they are nothing more; they are supported neither by any pertinent argument nor by any pertinent authority; nor can they be so supported. The case does not admit of the consideration of any such question.

1. The plaintiffs in the bill of review (appellants here) are defendants in the decree to be reviewed. The decree to be reviewed is an express adjudication against the appellants *of the validity of the alleged conveyances*

of Mrs. Garcelon's property to the trustees Stanly and Purington—it is an express adjudication that each of these appellants respectively did have the right to dispute the validity of the trust deed and assignment of personal property, and did have the right to claim the property—the very foundation of the decree, as expressd in its own words, is that the Court has heard and considered the question of the validity of the trust deed and assignment of personal property. This, of course, includes an adjudication that each respectively of these appellants had a right to question the validity of the alleged trust, a right to claim the property and to have that claim heard.

The appellees do not claim, nor could they claim, that the status of either of the appellants has changed since the making of the decree sought to be reviewed.

All the claims and assertions of Judge Hayne and Mr. Olney upon this head are therefore conclusively answered by the very decree which they defend. While the decree sought to be reviewed stands, it is an estoppel which forbids the parties to it from disputing what is therein adjudged. What is therein adjudged is that these appellants respectively had, when that decree was made, a right to dispute the validity of the alleged trust, a right to claim the property embraced in it and to have that claim heard by the proper Court and to have its judgment thereon. And this cannot be adjudged untrue except upon the ground that the

suit was not within the jurisdiction of the Court.

See the Decree—Transcript, pp. 222–228.

2. Again, from the bare fact that the appellants are parties defendant in the decree to be reviewed and that that decree is, as just stated, an adjudication against them of the validity of the alleged conveyance of Mrs. Garcelon's property to the trustees, Stanly and Purington, and that the error in law apparent upon the face of the pleadings and decree, is that the Circuit Court had no jurisdiction of the suit—from this it follows that the first question to be considered is that of the jurisdiction of the suit by the Circuit Court, and that, upon its being seen that such jurisdiction did not exist, nothing else can be considered.

So far as its scope extends, a bill of review is the full equivalent of a writ of error or an appeal.

See the Authorities, pp. 37–40 *supra*

It is thoroughly settled that, upon a writ of error or appeal, it would be, in such a case, *i. e.*, a case where the Court was without jurisdiction—utterly immaterial whether the party seeking the relief is or is not aggrieved by the erroneous decree. All this has been expressly decided by the Supreme Court and is thoroughly settled.

Railway Company vs. *Swan*, 111 U. S. 379, was a case removed to the United States Circuit Court from the State Court and a judgment given upon the merits.

On appeal the Supreme Court reversed the judgment upon the ground that the United States Circuit Court was without jurisdiction of the suit. In so doing the Supreme Court expressly decided the very point we here urge. The Supreme Court said (at p. 382):

> "*It is true that the plaintiffs* below, against whose objection the error was committed, *do not complain of being prejudiced by it*, and it seems to be an anomaly and a hardship that the party at whose instance it was committed should be permitted to derive an advantage from it; but the rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires the Court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other Courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal *the first and fundamental question is that of jurisdiction*, first, of this Court, and then *of the Court from which* the record comes. This question the Court is bound to ask, even when not otherwise suggested, *and without respect to the relation of the parties to it.*" * *

At p. 383:

> " And in the most recent utterance of this Court upon the point in *Bors* vs. *Preston*, *ante*, 252, it was said by Mr. Justice Harlan: ' In cases in which the Circuit Courts may take cognizance only by reason of the citizenship of the parties, this Court, as its decisions indicate, has, except under special circumstances, *declined to express any opinion upon the merits*, on appeal or writ of error, *where the record does not affirmatively show juris-*

diction in the Court below; this, because the Courts of the United States, being Courts of limited jurisdiction, *the presumption in every stage of the cause is, that it is without their jurisdiction* unless the contrary appears from the record '. *The reason of the rule, and the necessity of its application are stronger and more obvious, when, as in the present case, the failure of the jurisdiction of the Circuit Court arises, not merely because the record omits the averment necessary to its existence, but because it recites facts which contradict it.*"

The Supreme Court then cited the *Dred Scott Case*, 19 How. and said (at pp. 383–4):

" And in this view Mr. Justice Curtis, in his dissenting opinion concurred; and *we adopt from that opinion* the following statement of the law on the point: ' *It is true* ', he said, 19 How. 566, ' *as a general rule, that the Court will not allow a party to rely on anything* as cause for reversing a judgment, *which was for his advantage* '. In this, we follow an ancient rule of the common law. But so careful was that law of the preservation of the course of its Courts, that *it made an exception out of that general rule, and allowed a party to assign for error that which was for his advantage*, if it were a departure by the Court itself from its settled course of procedure. The cases on this subject are collected in Bac. Ab. Error H, 4. And this Court followed this practice in *Capron* vs. *Van Noorden*, 2 Cranch, 126, where *the plaintiff below* procured the reversal of a judgment for the defendant *on the ground that the plaintiff's allegations of citizenship had not shown jurisdiction.* But it is not necessary to determine whether the defendant can be allowed to assign want of jurisdiction as an error in a judgment in his own favor. *The true question is, not what either of the parties may be allowed to do, but*

whether this Court will affirm or reverse a judgment of the Circuit Court on the merits, when it appears on the record, by a plea to the jurisdiction, *that it is a case to which the judicial power of the United States does not extend.* The course of the Court is, where no motion is made by either party, on it own motion to reverse such a judgment for want of jurisdiction, not only in cases where it is shown negatively, by a plea to the jurisdiction, that jurisdiction does not exist, but even when it does not appear affirmatively that it does exist. *Pequignot* vs. *R. R. Co.*, 16 How. 104. *It acts upon the principle that the judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted. Cutler* vs. *Rae*, 7 How. 729. I consider, therefore, that * * * *the first duty of this Court is, sua sponte*, if not moved to it by either party, * * * *to take care that neither the Circuit Court nor this Court shall use the judicial power of the United States in a case to which the Constitution and laws of the United States have not extended that power.*"

In the same decision (111 U. S. 384–5) the Supreme Court cites *United States* vs. *Huckabee*, 16 Wall. 414, and points out, that *because the error was the absence of jurisdiction of the Circuit Court*, the plaintiff in the suit, *though he had himself induced the Circuit Court to take and hold jurisdiction of the suit*, and *hence could not claim to be injured or prejudiced by the ruling*, was nevertheless given, on appeal, full relief on that ground. And the Court points out that the following cases were decided on the same principle, namely,

Barney vs. *Baltimore*, 6 Wall. 280;
Williams vs. *Nottawa*, 104 U. S. 209.

And to those we may now add

Blacklock vs. *Small*, 127 U. S. 96.

The course of inquiry upon the bill of review in the case at bar must needs be the same as it would have been on appeal, the course stated by the Supreme Court in *Railway Company* vs. *Swan*, 111 U. S. (quoted on pp. 101-103 of this brief).

The bill of review being filed by parties defendant in the decree, the first question will be that of the jurisdiction of the bill of review by the Circuit Court. Such jurisdiction is admitted (see Judge Hayne's Brief p. 70) and could not have been denied. *The next question will be, whether it is apparent upon the face of the pleadings and decree that the United States Circuit Court had no jurisdiction of the original suit.* And, upon that question being answered in the affirmative, the inquiry can go no further. The Supreme Court has said:

> " In such a case we deem it our duty to stop the [original] suit just where it should have been stopped in the Court below and remit the parties to their original right."

Williams vs. *Nottawa*, 104 U. S. 212.

To the same effect are

Railroad Company vs. *Swan*, 111 U. S. 379;
Blacklock vs. *Small*, 127 U. S. 96;
Metcalf vs. *Watertown*, 128 U. S. 587.

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3. In support of his assertions and claims upon this point, Mr. Olney, on pages 14–20 of his second brief

cites a list of cases in which it was held that it is only parties who are aggrieved by a decree that may file a bill of review, and he quotes extensively from the decisions. On pages 8–15 of his brief Judge Hayne also cites a list of authorities to the same effect.

The cases so cited by Judge Hayne and Mr. Olney are not in point. In every one of them the Court had jurisdiction of the subject-matter and of the parties of the suit in which the decree sought to be reviewed was made. Having jurisdiction of the subject-matter and the parties, the Court had jurisdiction to pass upon any question in the case, and along with others, upon the question whether the party bringing the bill of review would derive any financial benefit from the relief sought.

Let the learned counsel produce, if they can, an instance in which such a ruling was made in a case where (as in the case at bar) it was apparent upon the face of the pleadings and decree that the Court was without jurisdiction. Mr. Olney has "tried to read "all the cases decided in this country, and referred to "in the text-books and digests relating to bills of "review", but neither he nor any of his colleagues has produced any such instance. No such instance exists.

On p. 8 of his brief, Judge Hayne says: "Even an "appeal is allowed only to a party aggrieved." Very well. Out of all the numerous cases on writs of error and appeals taken from judgments and decrees of the

Circuit Courts of the United States, upon the ground that the judgment or decree was made without jurisdiction, let the learned counsel produce, if they can, an instance in which such a ruling was made as they now demand. No such instance can be produced, for none exists. On the contrary, the Supreme Court has expressly ruled that, upon a writ of error or appeal in such a case, the relief will be awarded, even though the party appealing from the decree "*do not complain of* " *being prejudiced by it*".

Railroad Company vs. *Swan*, 111 U. S. 382, quoted above.

The rule upon the bill of review must be the same.

In *Smith* vs. *Clay*, Amb. 647, the Court said:

"This bill of review is like a writ of error, to reverse a decree."

In *Enochs* vs. *Harrelson*, 57 Miss. 468, the Court said:

"A bill of review for error apparent on the face of the decree, is in the nature of an assignment of errors, on writ of error, and the error must appear on the face of the pleadings, proceedings and decree, without reference to the evidence."

In *Evans* vs. *Clement*, 14 Ill. 209, the Court said:

* * * "the rule has now become well settled

> that the Court will, upon such a bill, reverse or revise its own decree, for an erroneous application of the law to the facts found, whenever a Court of appeals would do so for the same cause."

Similar declarations of the Courts could be readily quoted in great number.

In *Railroad Company* vs. *Swan*, 111 U. S. 382–385, the Supreme Court has given reasons, quoted on pp. 101-103 of this brief—why, in such a case, the relief is awarded even though the party appealing from the decree "*do not complain of being prejudiced by it*".

It is plain that those reasons apply even more powerfully to a bill of review than to an appeal.

A radical difference between the cases cited by Judge Hayne and Mr. Olney, and cases where the error of law apparent upon the face of the pleadings and decree is that the Court was without jurisdiction of the suit, is this: Every citizen of a State has the legal right of access to its courts of justice for the determination of any controversy which he may have and which belongs exclusively to their jurisdiction. This is a fundamental legal right.

> *1 Bl. Comm.* 141;
> *Crandall* vs *Nevada*, 6 Wall. 44;
> *Slaughter House Cases*, 16 Wall. 79;
> *Butchers Union Co.* vs. *Crescent City Co.*, 111 U. S. 764.

In every case where a Circuit Court of the United

States has, without jurisdiction of the subject matter of the suit, made against a citizen of the State, a judgment or decree upon the merits, such party is, by such judgment or decree, necessarily deprived of that fundamental legal right, and is, therefore, necessarily aggrieved. Whether any financial benefit can be derived from the exercise of such right, and if any, how great may be that advantage, are questions to be answered by the State Courts, and by them only.

But in the cases where the Court has jurisdiction, no one is deprived of any such right.

Other radical and manifest differences, making the decisions cited by Judge Hayne and Mr. Olney utterly inapplicable, are mentioned above.

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4. An appeal is a separate proceeding, of which there is a separate jurisdiction. (*Railroad Co.* vs. *Swan*, 111 U. S. 382; *Merritt* vs. *Bowd. Coll.*, 167 U. S. 745). In the same sense, a bill of review is a separate proceeding, of which there is a separate jurisdiction (*Clark* vs. *Killian*, 103 U. S. 766; *Ensminger* vs. *Powers*, 108 U S. 302). But, so far as concerns the scope of the inquiry, the appeal or the bill of review is respectively only a continuation of the former suit, for the purpose of reviewing the decree, precisely as it might have been reviewed by the Circuit Court in the original suit at any time before the close of the term at which it was made. It is for this reason that, on appeal, "a denial

" of jurisdiction [of the Circuit Court] forbids all
" inquiry into the nature of the case. It applies to
" cases perfectly clear in themselves ".

Osborn vs *U. S. Bank*, 9 Wheat. 847;
Railroad Co. vs. *Swan*, 111 U. S. 382–5, 386;
Metcalf vs. *Watertown*, 128 U. S. 587.

For the same reason, the same rule must apply to the bill of review. "A denial of the jurisdiction [of " the original suit] forbids all inquiry into the nature " of the case"—"the said Circuit Court shall proceed " no further therein, but shall dismiss the suit." Such is the express mandate of the Act of Congress, and it is of course to be obeyed.

Act of March 3, 1875, Sec. 5, 18 Stats. 470, 472;
Railroad Co v. *Swan* 111 U. S. 382;
Metcalf v. *Watertown* 128 U. S. 587.

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5. Still other considerations might be added. If, although never having had jurisdiction of the original suit, the Court could still hear and determine the question whether the party bringing the bill of review will derive any financial advantage from having the decree reversed and the suit dismissed, on the same principle the whole case could be retried upon still other questions of the merits, and the bill of review denied upon the ground that the original decree upon the merits was correct. Where the subject-matter of the original

suit was not within the jurisdiction of the Circuit Court, that Court is destitute of power to consider any other question. All such other questions are for the State Courts, and for them only. Whatever might be the conclusion of the Circuit Court as to the right of the party bringing the bill of review to litigate upon the merits of the original suit, it would be always legally possible for the State Court to reach a contrary conclusion, and the party bringing the bill of review has the fundamental legal right to seek and obtain the judgment of the State Court.

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6. The foregoing considerations upon this head dispose also of the plea which the appellees for whom Mr. Olney appears have (as he *asserts*) filed in the Court below, but the sufficiency of which has not yet been considered. By no legal possibility can it be shown by plea, as a defense to the bill of review, that the appellants can derive no financial advantage from the relief they seek. Such plea is conclusively met by each of two answers, namely: 1. It is an attempt to contradict the original decree which it is put forward to sustain; and 2. The first inquiry in the case is whether it is apparent upon the decree and pleadings that the Circuit Court was without jurisdiction of the original suit. An affirmative answer bars every other question.

> "In such a case we deem it our duty to stop the [original] suit just where it should have been

stopped in the Court below, and remit the parties to their original rights."

Williams v. *Nottawa*, 104. U. S. 212.

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7. It is an old and universal saying, the truth of which is axiomatic, that acts and conduct speak louder and argue more potently than mere words. By their acts and their conduct the appellees—or at least such of the appellees as are actually contesting the bill of review—proclaim most emphatically that it is not true that the appellants respectively are not aggrieved by the decree to be reviewed.

If the appellants were not aggrieved, if neither of them would have the right to question the validity of the trustee Stanly's title, then it would be of no importance whatever to defeat the bill of review. If these appellants have no right to question the trustee Stanly's title, then no party whatever who is bound by the decree to be reviewed, would have such right. If, therefore, the argument put forward for the appellees upon this point were true, it would be of no interest to any appellee to resist the bill of review.

Why, then, all the labors, all the trying to read all the decisions upon bills of review, all the searching and ransacking the case from end to end and decisions far and wide to search for technical defenses, all the laborious briefs, all the desperate contentions that are put forward to defeat this bill of review? These are

all arguments, more potent than anything said to the contrary, that the appellants have the right to show in the Courts of the State the invalidity of the trustee Stanly's title and to recover the property of the alleged trust, and that such right is a substantial right.

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8. On pp. 8–15 of his brief, Judge Hayne urges that Mrs. Garcelon's will affirms the trust deed to the appellee Stanly, and thereby prevents the appellant Reed, as administrator of her estate, from disputing its validity. The will does not mention the trust deed, and plainly no more prevents the administrator from questioning its validity and claiming the property than it would prevent him from disputing the validity of any other instrument purporting to be a conveyance of property by her or from claiming any other property of the estate adversely held under an invalid conveyance from her.

The right of the appellants to question the validity of the trustee Stanly's title and to recover the property embraced in the trust deed and assignment, are stated in outline on pp. 22–34 of the appellants' first reply brief. We refrain from any extended discussion of the point, because, for the reasons stated above, it is not within the scope of the inquiry before the Court.

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9. The bill of review states that the appellant James P.

Merritt is the "owner" of the property of the alleged trust (Transcript p. 275) and the demurrers admit such allegation to be true. It is the averment of the ultimate fact and would entitle this appellant to show, if needful to entitle him to the relief asked, that he has acquired the claim of any other party defendant in the original suit, as, for instance, the claim of the residuary legatee, Harry P. Merritt.

Whiting vs. *U. S. Bank*, 13 Pet. 13;
McCall vs. *McGurdy*, 69 Ala. 70;
Turner vs. *White*, 73 Cal. 299;
Heeser vs. *Miller*, 77 Cal. 192.

For the reasons stated in the appellants' opening brief, in the first reply brief, and in this brief, we respectfully ask that the decree appealed from be reversed, and upon such grounds as to expedite a final disposition of the suit.

RODGERS, PATERSON & SLACK,
Counsel for Appellants.